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The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

A RECENT article stated that the combined cost of three four-lane highways from New York to Los Angeles and of a sixty-thousand-dollar schoolhouse erected on every other section on one side of each route would amount to a billion dollars. The annual income of the insurance industry in the United States represents the cost of twenty-seven such highways and thirteen thousand five hundred such schoolhouses. This illustration gives a sort of tangibility to the somewhat incomprehensible fact that the income of insurance companies each year constitutes nine per cent of the total arising from all business transacted in this country. We are proud to be identified with that industry and are striving to increase the importance of the part taken therein by this Association.

The standing committees, other than those which direct the activities of the annual meeting, were established in order that through their efforts the foregoing result would be effected, and, through them, further integration of this association with the industry which it serves would be brought about. Accordingly, the role of the committees is of incalculable value, and upon them the success of the Association to a very great extent depends. The chairmen have been asked to formulate the programs at an early date in order that they may be co-ordinated and fully developed. All these programs should be such as will permit and require each member to have an active and productive part therein. It is his privilege to have the opportunity of manifesting interest in this Association and its attainments and, therefore, of definitely sharing in the project to be undertaken by his committee.

At the midwinter meeting, which is to be held on February 5th and 6th, the place and date of the annual meeting will be decided. It still appears that transportation will be affected less if the place should be near that at which the American Bar will convene, and that the dates should be during the week immediately preceding the latter meeting. The April *Journal* will report the midwinter meeting and the decision as to where and when we shall gather again to take stock of and realize on another year's accomplishment.

May this January usher in another twelve months of success and accompanying prosperity.

F. B. BAYLOR
President.

Lincoln, Nebraska.

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1945 CONVENTION

IT now appears that all conventions during at least the first six months in this year will be banned. Your Executive Committee will meet on the 5th and 6th of February to handle the business of the Association, and, of course, will give consideration to your 1945 annual meeting. Let us hope that conditions in Europe by September of 1945 will be such that a meeting can properly be held.

* * *

EXPERT TESTIMONY

I have recently received from Lowel R. Johnson of Kansas City, Missouri, a prepared statement by Dr. Vincent Williams of Missouri on expert testimony. With Dr. Williams' permission, I am happy to publish his discussion on "Expert Testimony", which I am sure you will read with interest.

"When a physician is called to the witness stand not only is his integrity, his knowledge, his mental celerity, and his ability to exploit these attributes on trial. The whole medical profession, as reflected by him, is on trial as well.

"He may be asked to qualify as an expert in a particular field. This qualification is usually substantiated by self-acclamation, by badges or ribbons of special organization, by various fictitious or high-sounding titles, and occasionally he is the real McCoy.

"After swearing to tell the truth, he is asked questions in such a way he can't tell the truth, or perhaps he just has a pleasing way of answering to the benefit of his side.

"He must know the answer to everything, because he is an expert. He may not explain an answer; he must answer yes or no. Does he agree with this authority who says something is black, or with that authority who says it is white? *Pari passu,* what is an authority, and for how long?

"After this, the 'expert testimony' on the opposite side gets on the stand and says just the opposite.

" 'The man needs an operation, or he will always suffer.' 'The man does not need an operation, his prognosis is good.' 'The woman's headaches are due to her head injury.' 'No, her headaches are because of the menopause.' 'Her womb is tilted because of being thrown from a car, thereby causing backache, repeated miscarriages,' etc. 'You cannot tilt a womb by means of an injury, and a tilted womb rarely causes backache.' When is a fracture not a fracture?

"Why such a variance in opinions? Doubtless some are perfectly honest differences; some can stretch the truth better than others and not lie; and one wonders about some. How must we appear to others? Don't we know the answers, are we deliberately falsifying or what is wrong with doctors when on the witness stand?

"All this melee of testimony over the dead bodies of our self-respect and the respect of non-medical people.

"There stands Justice. Her tresses awry. Her white robe stained and spotted. Rather *deshabille.* Defloration complete. Yes, Justice, nevertheless, nonchalantly flipping a coin to decide which story sounds most likely.

"The phrase 'in my opinion' covers everything. However, the basis or source might as well be thin air. Would it not look different, however, if all such 'opinions' were mimeographed and sent to the members of the Society?

"It would have a salutary effect if all contentious medical testimony were reviewed by a delegated committee of the local County Medical Society. This at least, would have an inhibiting influence on specious 'expert testimony'."

* * *

BINDER OR INSURANCE CONTRACT

In April, 1944, issue of *Insurance Counsel Journal,* page 4, reference was made to the case of Penn Casualty Company v. Upchurch, 139 Fed. (2d) 892. Apparently two of our members read that issue of the *Journal* as I

have before me comments from Edward I. Taylor, Vice-President of The Century Indemnity Company, and from G. L. Reeves, of Tampa. It is with pleasure that I publish the comments of Mr. Taylor and Mr. Reeves.

COMMENTS BY MR. TAYLOR

"I note in the April issue of the *Journal* your reference on page four to the case of Pennsylvania Casualty Company vs. Upchurch, 139 Fed. (2) 892, and your invitation to the members to discuss it.

"I have no quarrel with the majority opinion. It seems to me to be perfectly sound, but I am very much disturbed by the dissenting opinion which states in the second sentence of the opening paragraph, 'Upchurch's argeement was to accept and pay the premiums on the policy; the company's agreement was to issue the policy and to protect Upchurch against liability to third parties and not to protect third parties against Upchurch.'

"I do not believe that there was any such agreement as stated in the quoted language. I do not believe that Upchurch agreed to accept the policy, nor do I agree that the company agreed to issue the policy. It is this latter proposition that disturbs me because it may be the foundation for decisions in this court and others that when the company issues a binder it must also issue the policy. Any such proposition would be contrary to the usual understanding in the business, and certainly would make it dangerous to use binders in the majority of cases, since they are used largely in those cases where the company wishes to investigate either the insured or the risk before issuing a policy and issues the binder because the insured needs immediate temporary protection.

"The ordinary binder is present insurance, like a policy. It is a temporary convenient substitute or equivalent for the policy or renewal receipt pending the execution of the formal instrument. It becomes merged in the policy after the policy is issued. Section 81, Richards on Insurance Law, Third Edition.

"The issuance of a binder bears little resemblance to ordinary commercial bargains and has certain peculiar characteristics of its own:

"1. The act and time of delivery of the policy itself are a comparatively triffling significance.
"2. The contract is complete and closed when the binder is signed and delivered.
"3. The binder is the same thing in effect as the usual policy for which it stands as a convenient substitute.

"Richards on Insurance Law, Third Edition, Sec 75.

"The binder being present insurance, when a loss occurs before the policy is issued, the action may be brought at common law upon the binder. Richards on Insurance Law, Third Edition, Section 83.

"Thus, in the Georgia decision, the binder was a complete and valid contract of temporary insurance and carried with it no obligation on the part of the insured to accept the policy, and likewise carried no obligation on the part of the company to issue the policy. If no policy was issued for any reason, the insurance terminated by its own terms at the end of eight days.

"The binder is a memorandum usually embodying the most important terms of a preliminary contract of insurance, intended to give temporary protection to the insured during an investigation of the risk and until the policy can be issued. It is subject to the conditions of the contemplated policy, although it may not issue it. A cover note issued by an indemnity company being a memorial of a prior oral contract of indemnity insurance which the parties intended to take effect as stated in the note, is in itself a contract of present insurance. Cooleys Briefs on Insurance, Second Edition, Volume 1, Page 810.

"If the insurer declines to accept the risk, the binding effect of the slip ceases at once. So too, the binder may be recalled and cancelled before it is delivered to or accepted by the insured. Cooleys Briefs on Insurance, Second Edition, Volume 1, Page 811.

"I take it also that unless the binder by its terms provides insurance for a specified length of time, it may be cancelled even after it is delivered, at least such is the practice in the business and it has never been questioned so far as I know.

"It is held in Lipman v. Niagara Fire Insurance Company, 121 N.Y. 454, 24 N.E. 699, that a binder slip constitutes a contract of insurance. If this is so, then all its terms must be considered in construing the contract. The contract in the Georgia decision being

for eight days and no policy having been issued, it terminated at the end of the eighth day and there was no obligation on the company to issue the policy or on the assured to accept the policy.

"I think the language in the dissenting opinion is very disturbing and if the doctrine stated in the quoted language prevails to any extent, companies will have to cease the use of binding slips."

COMMENTS BY MR. REEVES

"In the April issue of the *Insurance Counsel Journal* you call attention to the decision of *Penn Casualty Company vs. Upchurch,* 139 Fed. (2d) 892.

"The dissenting opinion of Judge Waller, for whom I have the highest admiration and respect, should have been the majority opinion.

"However, I do not believe that this decision should particularly worry the companies or their attorneys because the facts are so rare and unusual. Of course, all of the facts do not appear in the opinion because it does not state whether the assured had actually placed the other insurance prior to the collision but, if he did, there may have been a policy violation which was not urged in that case. It is indeed a rare case where the assured, after a claim has arisen under a policy, notifies the agent that he doesn't want the policy.

"I realize that some of the principles announced by Judge Holmes are somewhat alarming but were, no doubt, prompted by the particular facts of that case. He evidently reached the conclusion that the binder was a valid contract until one of the parties thereto had breached the same, and that the breach by the assured was after the claim had arisen.

"Although this opinion is from our Circuit, when read in connection with other decisions of the same court and the Supreme Court of Florida, I do not believe it will cause us much trouble."

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Robert D. Guy, Electric Railway Bldg., Winnipeg, Man., Canada.
Roger Lacoste, 221 St. James St. West, Montreal, Canada.

COLORADO

Chairman: Lowell White, Equitable Bldg., Denver 2, Colorado.
Edgar McComb, First National Bank Bldg., Denver 2, Colorado.
Godfrey Nordmark, 1020 First National Bank Bldg., Denver 2, Colorado.

CONNECTICUT

Chairman: Allan E. Brosmith, Travelers Ins. Co., 700 Main St., Hartford, Conn.
John Paul Faude, Aetna Life Affiliated Companies, 151 Farmington Ave., Hartford, Conn.
Wilson C. Jainsen, Hartford Acc. & Ind. Co., 690 Asylum St., Hartford, Conn.

DELAWARE

Chairman: William Prickett, Equitable Bldg., Wilmington 7, Del.
Abel Klaw, DuPont Bldg., Wilmington, Del.
James R. Morford, Delaware Trust Bldg., Wilmington, Del.

DISTRICT OF COLUMBIA

Chairman: Henry I. Quinn, Woodward Bldg., Washington 5, D. C.
Frank F. Nesbit, Metropolitan Bank Bldg., Washington 5, D. C.

FLORIDA

Chairman: R. W. Shackleford, Tampa Theatre Bldg., Tampa, Fla.
Francis M. Holt, 1321 Graham Bldg., Jacksonville 1, Fla.
Charles Cook Howell, Jr., 601 Atlantic National Bank Bldg., Jacksonville 2, Fla.

GEORGIA

Chairman: John M. Slaton, 22 Marietta St. Bldg., Atlanta 3, Ga.
James S. Bussey, Southern Finance Bldg., Augusta, Ga.
Joseph W. Popper, Persons Bldg., Macon, Ga.

HAWAII

Chairman: Eugene H. Beebe, Bishop Trust Bldg., Honolulu, Hawaii.

IDAHO

Chairman: R. P. Parry, Fidelity National Bank Bldg., Twin Falls, Idaho.
Oliver O. Haga, Idaho Bldg., Boise, Idaho.
E. B. Smith, Idaho Bldg., Boise, Idaho.

ILLINOIS

Chairman: Thomas N. Coen, Security Mutual Cas. Co., 105 S. LaSalle St., Chicago 3, Ill.
William D. Knight, Forest City National Bank Bldg., Rockford, Ill.
L. Duncan Lloyd, 135 S. LaSalle St., Chicago 3, Illinois.

INDIANA

Chairman: Hugh E. Reynolds, Consolidated Bldg., Indianapolis 4, Indiana.

Harry P. Cooper, Jr., Farmers Mut. Liab. Co., 2105 N. Meridian St., Indianapolis, Ind.

Gallitzen A. Farabaugh, Union Trust Bldg., South Bend, Indiana.

IOWA

Chairman: John D. Randall, American Trust Bldg., Cedar Rapids, Iowa.

Oliver H. Miller, Suite 403, Equitable Bldg., Des Moines, Iowa.

Carl C. Riepe, 510 Tama Bldg., Burlington, Iowa.

KANSAS

Chairman: Allen Meyers, New England Bldg., Topeka, Kansas.

Edward M. Boddington, Suite 1109-1116 Huron Bldg., Kansas City, Kansas.

Robert L. Webb, National Bank of Topeka Bldg., Topeka, Kansas.

KENTUCKY

Chairman: Robert P. Hobson, 1805-26 Kentucky Home Life Bldg., Louisville 2, Ky.

R. W. Keenon, 504 Security Trust Co., Lexington, Kentucky.

Leslie W. Morris, Farmers Deposit Bank Bldg., 216 W. Main St., Frankfort, Ky.

LOUISIANA

Chairman: Alvin R. Christovich, American Bank Bldg., New Orleans 12, La.

Leslie P. Beard, American Bank Bldg., New Orleans 12, La.

Alfred Charles Kammer, Hibernia Bank Bldg., New Orleans 12, La.

MAINE

Chairman: Clement F. Robinson, 85 Exchange St., Portland, Maine.

William B. Mahoney, 120 Exchange St., Portland 3, Maine.

James E. Mitchell, Eastern Trust Bldg., Bangor, Maine.

MARYLAND

Chairman: Milton A. Albert, New Amsterdam Cas. Co., 227 St. Paul St., Baltimore 3, Md.

E. Kemp Cathcart, Maryland Cas. Co., 701 W. 40th St., Baltimore, Md.

Charles T. LeViness, III, Munsey Bldg., Baltimore, Md.

MASSACHUSETTS

Chairman: Franklin J. Marryott, Liberty Mut. Ins. Co., 175 Berkeley St., Boston, Mass.

Arthur F. Bickford, 530 Exchange Bldg., Boston, Mass.

Elias Field, 15 State St., Boston 9, Mass.

MICHIGAN

Chairman: George H. Cary, Ford Bldg., Detroit, Mich.

Paul E. Cholette, 10th Floor Peoples National Bank Bldg., Grand Rapids, Mich.

Ralph B. Lacey, Dime Bldg., Detroit 26, Mich.

MINNESOTA

Chairman: F. H. Durham, Northwestern Bank Bldg., Minneapolis 2, Minn.

Ernest A. Rich, First National Soo-Line Bldg., Minneapolis, Minn.

John J. Sexton, Pioneer Bldg., St. Paul 1, Minn.

MISSISSIPPI

Chairman: Pat H. Eager, Jr., 1001 Standard Life Bldg., Jackson 105, Miss.

C. B. Snow, Deposit Guaranty Bank Bldg., Jackson, Miss.

W. Calvin Wells, III, Lamar Life Bldg., Jackson 102, Miss.

MISSOURI

Chairman: Frank C. Mann, Landers Bldg., Springfield, Mo.

George E. Heneghan, 418 Olive St., St. Louis, Mo.

James E. Nugent, Bryant Bldg., Kansas City 6, Missouri.

MONTANA

Chairman: J. W. Speer, First National Bank Bldg., Great Falls, Mont.

W. J. Jameson, Electric Bldg., Billings, Mont.

NEBRASKA

Chairman: Don W. Stewart, Sharp Bldg., Lincoln 8, Neb.

John L. Barton, First National Bank Bldg., Omaha, Neb.

Paul P. Chaney, First National Bank Bldg., Falls City, Neb.

NEVADA

Chairman: Albert D. Ayres, 309 First National Bank Bldg., Reno, Nev.

John T. McLaughlin, 309 First National Bank Bldg., Reno, Nev.

NEW HAMPSHIRE

Chairman: Louis Eliot Wyman, 45 Market St., Manchester, N. H.

Stanley M. Burns, Strafford Bank Bldg., Dover, N. H.

Maurice F. Devine, Bell Bldg., 922 Elm St., Manchester, N. H.

NEW JERSEY

Chairman: Lionel P. Kristeller, 744 Broad St., Newark, N. J.

Gerald T. Foley, Raymond Commerce Bldg., Newark, N. J.

Sylvester C. Smith, Jr., The Prudential Ins. Co. of America, 18 Bank St., Newark 1, N. J.

NEW MEXICO

Chairman: Pearce Coddington Rodey, Box 422, Albuquerque, N. M.

Lake Jenkins Frazier, 123 West Fourth St., Box 942, Roswell, N. M.

Carl H. Gilbert, A. B. Renehan Bldg., Sante Fe, N. M.

NEW YORK

Chairman: James M. O'Hara, Foster Bldg., Utica, N. Y.

Milton L. Baier, 268 Main St., Buffalo, N. Y.

Raymond N. Caverly, Fidelity & Casualty Company of N. Y., 80 Maiden Lane, New York, N. Y.

Donald Gallagher, 901 Home Savings Bank Bldg., Albany 7, N. Y.

John H. Hughes, Onondaga County Savings Bank Bldg., Syracuse 2, N. Y.
Henry W. Nichols, National Surety Corp., 4 Albany St., New York 6, N. Y.

NORTH CAROLINA

Chairman: Willis Smith, Security Bank Bldg., Raleigh, N. C.
Charles H. Gover, Law Bldg., Charlotte 2, N. C.
Frank H. Kennedy, Law Bldg., Charlotte 2. N. C.

NORTH DAKOTA

Chairman: Clyde L. Young, First National Bank Bldg., Lock Drawer 269, Bismarck, N. D.
Herbert G. Nilles, Black Bldg., Fargo, N. D.
John F. Sullivan, First National Bank Bldg., Mandan, N. D.

OHIO

Chairman: William E. Knepper, 5 East Long St., Columbus 15, Ohio.
Ellis Raymond Diehm, Union Trust Bldg., Cleveland, Ohio.
Philip J. Schneider, Union Central Bldg., Cincinnati, Ohio.

OKLAHOMA

Chairman: Welcome D. Pierson, 1515 First National Bldg., Oklahoma City 2, Okla.
Parke Davis, Insurors Indemnity & Ins. Co., Box 1769, Tulsa, Okla.
H. L. Smith, Kennedy Bldg., Tulsa 3, Okla.

OREGON

Chairman: Borden Wood, American Bank Bldg., Portland, Ore.

PENNSYLVANIA

Chairman: Joseph W. Henderson, Packard Bldg., Philadelphia, Pa.
Dale C. Jennings, Berger Bldg., Pittsburgh, Pa.
F. Lyman Windolph, 121 East King St., Lancaster, Pa.

RHODE ISLAND

Chairman: Francis V. Reynolds, 315 Turks Head Bldg., Providence 3, R. I.
Henry M. Boss, 702 Turks Head Bldg., Providence 3, R. I.
Harold R. Semple, 702 Turks Head Bldg., Providence 3, R. I.

SOUTH CAROLINA

Chairman: Benjamin Allston Moore, One Broad St., Charleston, S. C.
Pinckney L. Cain, Palmetto Bldg., Columbia, S. C.
George L. Buist Rivers, 28 Broad St., Charleston, S. C.

SOUTH DAKOTA

Chairman: F. G. Warren, Boyce Bldg., Sioux Falls, S. D.
Karl Goldsmith, Pierre National Bank Bldg., Pierre, S. D.
Charles S. Whiting, 207 Realty Bldg., Mitchell, S. D.

TENNESSEE

Chairman: Harry T. Poore, Fidelity Bankers Trust Bldg., Knoxville, Tenn.
Will R. Manier, Jr., Baxter Bldg., Nashville 3, Tenn.
Robert M. Nelson, Columbian Mutual Tower, Memphis 3, Tenn.

TEXAS

Chairman: J. A. (Tiny) Gooch, Sinclair Bldg., Fort Worth, Texas.
O. O. Touchstone, 1108 Magnolia Bldg., Dallas 1, Texas.
Thomas W. Wassell, Interurban Bldg., Dallas, Texas.

UTAH

Chairman: Edwin B. Cannon, 1218 Continental Bank Bldg., Salt Lake City, Utah.
Paul H. Ray, Kearns Bldg., Salt Lake City 1, Utah.
Dan B. Shields, Judge Bldg., Salt Lake City, Utah.

VERMONT

Chairman: Leonard F. Wing, Mead Bldg., Rutland, Vt.

VIRGINIA

Chairman: John J. Wicker, Jr., Mutual Bldg., Richmond 19, Va.
Leonard G. Muse, Boxley Bldg., Roanoke 4, Va.
Harvey E. White, Citizens Bank Bldg., Norfolk, Va.

WASHINGTON

Chairman: Payne Karr, Room 1210, 1411 4th Ave. Bldg., Seattle 1, Wash.
Cassius E. Gates, Central Bldg., Seattle 4, Wash.
R. E. Lowe, 622 Spokane Eastern Bldg., Spokane 8, Wash.

WEST VIRGINIA

Chairman: Stanley C. Morris, P. O. Box 1588, Charleston 26, W. Va.
Frank C. Haymond, Haymond Bldg., Fairmont, W. Va.
Russell G. Nesbitt, Riley Law Bldg., Wheeling, W. Va.

WISCONSIN

Chairman: Kenneth P. Grubb, 828 North Broadway, Milwaukee 2, Wisc.
Robert C. Grelle, 105 Monona Ave., Madison, Wisc.
J. Mearl Sweitzer, Employers Mut. Liab. Ins. Co., Wausau, Wisc.

WYOMING

Chairman: Clarence A. Swainson, Hynds Bldg., Cheyenne, Wyo.
M. A. Kline, Majestic Bldg., Cheyenne, Wyo.

CUBA

Chairman: Guillermo Diaz Romanach, The Trust Company Bldg., Havana, Cuba.

PANAMA

Chairman: William A. Van Siclen, No. 1 Fourth of July Ave., Ancon, Canal Zone.
Charles E. Ramirez, 6 Tivoli Ave., P. O. Box 945, Ancon, Canal Zone.

Address of Welcome

By Paul F. Jones
Danville, Illinois
Former Director of Insurance of the State of Illinois

I DEEPLY appreciate this opportunity to welcome you to Illinois. Your high standing in your profession is a distinction that would make you welcome anywhere, but returning to Chicago, you are among old friends—friends who share your convictions and always wish you success in your undertakings.

This year you come at a propitious time. The war in Europe is approaching a decision. The confusion of battle, the prodigious expenditure of men and material and the tension and uncertainty of that conflict will soon be at an end. Japan's surrender will follow in due time. But the emotional unbalance of the world will certainly continue. It requires no prophet to foresee that men of strong will and deep convictions will differ sharply as to the solution of post-war problems. All manner and form of remedies will be heard and yet, in that tumult of voices, there will be no accepted rule of right and wrong; no standard measure with which to evaluate the lust for power of the narcissism of our world evangelists. Certainly, at no time within our generation will there be a greater need for men of clear minds and judicious attitude.

Over the past ten years there has been built a Babylonian Tower of class consciousness, economic theory, and social doctrine that confounds our statesmen and citizens alike. Here in America, I know of no class of men in point of training, experience, and economic independence so admirably suited to the task of adjustment and order as the lawyers of the nation. Lawyers, as a class, analyze the problems of today in the light of precedent and experience. By training, they apply the logic and reason of tested rules to current events. As students of human nature, they are tolerant and understanding, yet are always firm in their effort to maintain a proper balance between individual liberty and the public good. Their effectiveness in public life, as well as in the field of law, has been demonstrated over and over again through the centuries. History shows that their influence contributes to good government and sound policies, but in the legal profession, as in every trade or calling, there are gentlemen of atavistic tendencies who are exceptions to the rule. I have in mind a small group of our professional colleagues, some of whom have suddenly been tossed into high places by the political catapult of the National Government. You may see fit to discuss the philosophy and theories of some of these legal grenadiers. If you do—and I hope you will—your meeting will be a spirited and memorable one. The debate and argument provoked by such a discussion should produce constructive suggestions and enable you to plan for the future. It is probable, however, that your differences of opinion will arise over methods and procedures rather than objectives. I like to believe that all of us, including those with whom we differ sharply, are striving for the same goal—that is, the maintenance of freedom in this rapidly changing world. By "Freedom", I mean the kind of freedom Americans have fought for since 1775; the kind that you and I have enjoyed and prospered under and now would pass along to our children and their posterity; the kind that Hazel Parker, an eighteen-year-old school girl, has described recently with eloquent simplicity. I quote:

"You cannot say what freedom is, perhaps, in a single sentence. It is not necessary to define it. It is enough to point to it.

"Freedom is a man lifting a gate latch at dusk and sitting for awhile on the porch smoking his pipe before he goes to bed.

"It is the violence of an agrument outside an election poll; it is the righteous anger of the pulpits.

"It is the warm laughter of a girl on a park bench.

"It is the rush of a train over the continent and the unafraid faces of people looking out of the windows.

"It is all the howdys in the world.

"It is Pegler telling Roosevelt how to raise his children; it is Roosevelt letting them raise themselves.

"It is Dorothy Thompson asking for war; it is General Hugh S. Johnson asking her to keep quiet.

"It is you trying to remember the words of our National Anthem.

"It is a man cursing all cops.

"It is the absence of apprehension at the sound of approaching footsteps outside your closed door.

"It is all the things you do and want to keep on doing. It is all the things you feel and can't help feeling.

"Freedom—it is you."

Again, let me express my pleasure in extending you an official greeting upon your return to Illinois. I hope your deliberations are successful and that when they are concluded, you can stay a while with us in Chicago.

Response To Address of Welcome

By Will R. Manier, Jr.
Nashville, Tennessee

WHEN Pat Eager asked me to respond to the Address of Welcome, I told him that in my opinion—and after listening to the address I know I am wrong about that part of it —that addresses of welcome and responses were merely things that encumbered a program and should be left off so that we could get down to the real gist of the proceedings for which we came to this convention.

I am glad, however, to tell you that after looking over the program, I think you will find that it is one that is well worth while, and I have always been interested in programs, believing that they should start on time, even though I delayed this one, but I expect Pat wanted to delay it until you got here, because usually the programs that I undertake to control, I try to start them exactly on the dot and close them exactly on the dot, but after looking over this program, I believe that you are probably going to have a very fine convention.

I remember a club to which I belonged once where the chairman of the program committee arranged, following the state fair, to have a trick horse as a part of the program. The horse undertook to answer various questions, tap a bell and do various things and at the conclusion of the meeting, some member of the group got up and said, "Mr. President, we have been meeting here week after week, month after month, year after year and this is the first time that we have ever had a whole horse on the program".

I hope that you will find most of those who participate, whole horses.

Which reminds me of the fact that somebody else said that horse sense was that a horse had too much sense to bet on a horse race, and that may be true, too.

In the spirit of this address of welcome, I plan to respond. We know we are all welcome here. We are welcome here in the sense that we are well come here into the City of Chicago as a group of lawyers that meet as a kind of preliminary to the meeting of the American Bar Association, where all the lawyers of the country will be assembled.

I have often been a bit disturbed because the lawyer is no longer taking the place in our community life that the laywer used to take. In pioneer days, the lawyer and the minister and the doctor and the clergyman were the men of education and the leaders in all community thought, but now other people, the business men, are college educated and they have, in a sense, deprived us of the leadership that we formerly had. Nevertheless, we still owe to our people back in our own communities the obligation of leadership in the problems which we face and, in the spirit of the address of welcome, I respond to that by saying that we, too, must assume leadership in a chaotic world, one that is soon to come about by reason of an event that we have devoutly looked forward to, and that is the coming of the peace. That peace may come with Germany soon. It will not come so soon with Japan, but when it does come, we are going to be faced with many problems here.

During the war, I have been much disturbed at the attitude of our people back home and, very briefly, in this little talk of mine, I want to tell you something about them. I acted as a kind of an amateur, unpaid Director of Civilian Defense in Tennessee, which included in our state, at least, an effort to act as coordinator of all the war work in the state, of the various federal agencies and the state departments and the voluntary associations that were engaged in that work, and from the beginning I have been greatly disturbed by certain things that I couldn't quite

analyze. Everybody I knew, when I undertook the job, undertook to give me free advice. Most of it was obvious, but all of it was good. But there was something in it that disturbed me. I can illustrate it better than I can generalize about it.

I had a superintendent of schools in an adjoining county to the county of the capital in which I live who had discovered that these younger boys were some day going into the Army, and so it occurred to him to come to see me and suggest that they ought to have some sort of elementary military training.

I said, "Fine. Why don't you put it in your schools?"

"No," he said, "that is not the way to do it. The President has to do something about it. The government has to do something about it. It has to be done in Washington."

The secretary of a chamber of commerce in one of our big cities telephoned me, a good friend of mine. He had the chairman of the committee on physical education in the public schools, who was also a good friend of mine, and they had discovered that there were a great many rejectees in the draft and he had a committee for the purpose.

"Fine," I said. "What are you going to do about it in Chattanooga?"

"Nothing. We don't think it ought to be done in Chattanooga. It ought to be done at Washington, or the governor ought to do something about it."

Church groups came to see me for their part of the participation in the war. I said to them, "What are you doing in your churches?"

"Nothing. We don't think that is the way to do it. The President ought to call a great inter-church conference in Washington and plan for what should be done there."

And then I had people, when we were setting up the Civilian Defense organization throughout the state, say to me, "Who is going to pay these air raid wardens?"

"Why, nobody. They are protecting your own community. It is their job; it is your job to protect it."

"Who is going to pay for all these control rooms that are connected with the Army warning system, and where are we going to get them? They will have to be open all night and they have to have a telephone and somebody there all the time."

"Why," I said, "I can find a place in your community for a control room. If you haven't got it, the sheriff's office or the City Hall, which are open all night, will serve the purpose."

"Well, maybe so. If so all right."

"Well, if you haven't got it there, how about an all night restaurant, or how about your telephone company? In any event, it is up to you to pay for it."

Then I made a list of a dozen or more mayors in my own state who either wrote me letters or telephoned me or came to see me and said that already their city councils had passed resolutions agreeing to accept anything the federal government would give them.

Now, I submit, with the pioneer tradition that we have in our own state and you have in your states, that it is a terrible situation when we are fighting a great war against totalitarianism, to want to abdicate to authoritarianism everywhere and have somebody higher up in Washington or elsewhere tell us what we should do back home.

And along with these people who talked to me, too, on every occasion, depending on who it was that talked to me, if it were an industrialist, he was criticizing labor; if it was a member of a labor union, he was criticizing the selfishness of capitalism and of the employer; the President was criticizing Congress and Congress was criticizing the President, and those of us who were not criticizing anybody else were criticizing the President's wife. And I was tremendously disturbed because we were engaged in a great international war for democracy and yet, under the impact of the totalitarian idea, we were wanting an authoritarian system in this country.

Now, this war is going to end. Part of it will end very shortly, and one of our first jobs as citizens—and the laywers must take the lead in it—is to restore local government, with decentralization of the centralized government that we know in Washington.

Along with that, we are going to have the problem first of re-converting all of these war industries back to actual production for peace, and then the problem which is connected with that of demobilizing the eleven million men and women who are in our armed services and absorbing them again into production for peace. And not only that, but many times that number of men and women who are engaged in war industry, who are going to have to be re-absorbed into production for peace. And all over the world we are going to have a difficult situation. When the

war is over, besides the necessity of re-employing these people into real production, we are going to have all sorts of problems and the peoples of the world, disgusted with the theories that have led them to the brink of chaos, are going to be out of sorts with the leadership that has led them there and they are going to offer the most fertile field for everybody's social nostrums and demagogic ideas that the world has ever seen; and if some of us don't awake to that, there is no telling what may happen as a result.

And I suspect there is not even agreement among us as to what we are fighting for. I doubt if any two men in this room would agree on that. I have been disturbed somewhat when I have talked to people about what we are fighting for. If you are talking to those who are employers, they are looking forward to a return to normalcy, meaning by normalcy, the pre-war normalcy that they had once before. And if you are talking to the labor leader, he wants a return, or at least an advance to complete unionization, the right of collective bargaining. The conservative wants one thing; the radical wants another, and I have tried to find a common denominator among all those things, and the only common denominator that I have been able to find is this, and I commend it to you; and if you accept it as a common denominator, if we all accept it as such, we may preserve those things we want most to preserve; and that common denominator is this, the right of every class, the right of every individual, to advocate for this country the things that he thinks will best serve the common good of us all, and that is the only common denominator that you can find. And yet it is always disturbing to find the reactionary wanting to deprive the liberal or the radical of freedom of advocacy, or the desire of the radical to deprive the reactionary of freedom of advocacy.

Personally, I hold unreservedly to that famous aphorism of Voltaire: "I don't agree with a thing that you say but I would give my life for your right to say it." And if we are going to preserve our democracy, if we are going to preserve the things that we love, we have got to stand for complete freedom of speech and of the press in this country; and that means not only freedom for me or you to stand up here and advocate what we believe in, but freedom for the other fellow to do the same thing, because if you or any other group can deprive some other group, me or somebody else, of the right to advocate what we believe in, then when the other fellow and his ilk get in control, he can deprive us of that right, too.

One more thought and I am done. I have had the opportunity, as president of a great international association, to try to save the world in far off places. Quite some time ago I came to the conclusion that the place for each one of us to try to save this world and our country and those ideals we hold dear is right back in our own home towns. And if we are going to preserve these things that we love, they are going to be preserved by each one of us, each member of this International Association of Insurance Counsel and of the American Bar Association going back home and taking our part in public affairs back there; and then, if Nashville and Chicago and Springfield and Washington and New York and Pittsburgh, or wherever it may be, if leading citizens unselfishly stand for those things that are not for their own self-interest but for the good of the whole country, then it will be possible, when we multiply that by all the communities in the United States, to keep this country of ours the kind of a country that we have been brought up in and which we cherish.

In that spirit, in that spirit and attitude, as provoked by our address of welcome, I say to the distinguished gentleman who has welcomed us here, thank you for your welcome, and I hope that all of us here will bend our thoughts, not only for the benefit of our own profession and for that specialization in that profession, insurance, in which we are engaged, but for the good of the whole country, every class and every citizen.

Report of President

PAT H. EAGER, JR.

The 1939 annual conventon of our Association was held at the Homestead in Hot Springs, Virginia, and was presided over by Milo Crawford who was then President of the Association. It was one of our most worthwhile and highly enjoyable conventions, except for one sad note, because while we were in session Hitler lit the torch that set the whole world afire. Our convention occupied the last two days of August and the first day of September and in the evenings we were sticking close to the radio getting the latest reports and all hoping that Mr. Chamberlain's peace efforts would succeed and I distinctly remember as I came down the elevator on the morning of September 1, the last day of our convention, how shocked I was when the operator told me that the war had begun. At that morning session you graciously elected me as a member of your Executive Committee and it seems that my tenure of office is calculated to pretty well parallel the beginning and ending of the war, which, however, is a mere condition and does not involve the principle of proximate cause! Our 1940 convention was held at White Sulphur Springs and presided over by Gerald Hayes, as President, and again the 1941 convention was held at the same delightful spot and presided over by Oscar Brown, as President. Both of those conventions were up to the fine standards of this Association, with excellent programs and the largest attendance in the history of the Association. But, the following year it became necessary for President Willis Smith to cancel the 1942 convention, although all plans had been perfected and the program arranged for another delightful meeting at the Greenbrier. You recall the fine convention that we had last year at this delightful resort hotel and the most excellent program President Willis Smith had for us.

At the mid-winter meeting of the Executive Committee on January 26, 27 and 28 of this year, which was held at the Palmer House in Chicago, the question of whether we should endeavor to hold our annual convention received the most thorough and careful consideration with the result that it was unanimously decided to have our convention, unless, in the meantime, conditions should arise which would demand a different course. It was decided at that time that if we held our convention in Chicago, that we would arrange it so as to convene just ahead of the American Bar Association, if possible, because a great majority of our members attend the American Bar and by such an arrangement one trip would suffice for both meetings.

We had hoped to be able to meet this year at the Homestead in Hot Springs, Va., and that lovely hotel could have taken care of us in the latter part of June, but after a conference with the railroad officials we all realized that it would be impossible for our group to get railroad accommodations, because, as you know, Hot Springs is somewhat isolated and is reached over only one railroad line. It was, therefore, decided that by reason of Chicago's central location and the fact that it has the best railroad facilities of any city in the country, that the Edgewater Beach was the proper place for our meeting.

The hotel management has been most courteous and cooperative in connection with all arrangements and I particularly wish to thank Mr. Craddock with whom I have had most of my contacts, as well as Mr. Webber and Mr. Dewey. Some of you doubtless encountered some delay upon your arrival in getting into your rooms, but those of you who have been traveling during the war appreciate the fact that this is something the hotels simply cannot avoid.

Some of you may wonder why our opening session was scheduled for the afternon instead of the morning. That was occasioned by reason of the fact that the hotel could not accommodate our group until today by reason of another convention and so our first session was set for this afternoon in order to allow time for members to arrive this morning and get settled as best as possible before our opening session.

Suitable reports will be submitted to you later in the program by the Secretary, Treasurer, Editor, and, also, Willis Smith will report on behalf of the Executive Committee. I will not, therefore, transgress upon these reports, but in order that you may be advised of the work of your Association since the last annual convention I will give you a brief report of these activities.

Since the adjournment of our last conven-

tion the Executive Committee has held three meetings. The first immediately following the adjournment of the convention, the second, the regular mid-winter meeting, and the third, last evening. I am glad to tell you that at the mid-winter meeting the attendance was one hundred per cent, although at our meeting last evening we could not hope to maintain this record because two of our members, Vice President Les Hemry, of Boston, and Vice President Lon Hocker, of St. Louis, are now both Lieutenants in the Navy and have been in Service for several months. It is needless to say that our best wishes go with them, together with one hundred nine other members, who are in Service, many on foreign fields.

At our first meeting, among other things, we were faced with the problem brought about by the resignation of our beloved and efficient former Secretary, Dick Montgomery, and the making of proper arrangements for an assistant to the Secretary or the Treasurer. At that time a committee was directed to meet at the call of the President for the solution of this problem and this meeting was held in Jackson, Miss., on July 29 and 30, and at which time there were present Retiring President Willis Smith, the new Secretary, Dave McAlister, former Secretary Dick Montgomery, Treasurer Robert M. Noll and Editor George Yancey. After the most careful consideration it was the conclusion of the committee that the Secretary and Treasurer would discharge their duties with the assistance of their personal office force and such extra assistance as they might need. Since this, of course, meant that good deal of detail work would be placed upon these two officers the amount which was formerly paid to Mr. Montgomery's assistant was allocated to their offices. As you know, all dues are now collected direct by the Treasurer and all checks issued by him. I assume that you know that none of your officers or members of the Executive Committee are paid any salaries from the funds of the Association. Officers and members of the Executive Committee are reimbursed for their actual hotel and traveling expenses in connection with the mid-winter meetings. At all other meetings of the Executive Committee each member pays his own expenses just as you do in attending the annual convention. You can, therefore, be assured that when you send in your check for annual dues your money is expended only for necessary expenses incident to the welfare of our entire organization. In fact, unless your claim is supported with a very accurate bill of particulars you will be met with a pleasant smile from our efficient Treasurer, but no cash on the barrel head. Bob Noll is liberal with his own money but he is down-right allergic to paying out the funds of your Association.

At this same committee meeting in Jackson the State Membership, State Legislative, Standing and Entertainment Committees were selected. You can, therefore, see that we had two full days work.

Heretofore it has been the practice to have our regular reporter present at each meeting of the Executive Committee and to take down and transcribe the entire proceedings. At our mid-winter meeting this year we decided to save this expense and instead of a regular reporter to take down all proceedings Mr. McAlister had his own secretary present and she took down only such portions of the proceedings as were necessary and the same procedure was followed at the meeting last evening and I think it has proven entirely satisfactory to everyone except our good friend the reporter.

The week previous to our mid-winter meeting in Chicago your President was invited to meet with those of our members who reside in and around New York and this meeting, in the form of a luncheon and general get-together, was held at the Biltmore Hotel in New York on January 22, and at which about one hundred of our members were present. It was a most enjoyable affair and that evening your President was a guest at the annual banquet of the New York Bar Association, which was held at the Waldorf-Astoria.

On August 15 a conferenre was held here at the Edgewater Beach at which Secretary McAlister and Pat Carey, Chairman of the General Entertainment Committee, and Mr. Craddock of the hotel and myself were present. We spent a full day and, in fact, part of the evening in making final arrangements for this convention.

I now wish to express my sincerest thanks and appreciation to the officers and members of the Executive Committee and the chairmen and members of our regular committees and all of whom have served so faithfully and efficiently. I have said before and I now say again that but for the cooperation and assistance of these men your speaker would have never been able to properly discharge the duties and responsibilities as President of your Association and I can truly say that with such

unselfish cooperation and assistance my task has been one of the greatest pleasures and I well know and appreciate that I am chief benefactor by reason of these most pleasant relationships. Until one has served on the Executive Committee no one can appreciate the tremendous amount of work involved in connection with the operation of the Association. George Yancey, as Editor of the Journal, has done more constructive and unselfish work to maintain the high standards of our Association than all of your Presidents put together. He, of course, has your untiring thanks and appreciation but I would indeed be ungrateful should I fail to pay tribute and express our thanks again to this most affable, affectionate and beloved Editor. Dave McAlister has filled his job as new Secretary like a veteran and both Dave and his efficient secretary, Mrs. Mary Greenawalt have our thanks and appreciation. I have already mentioned the efficient Treasurer of this organization. A lot of work takes place under his supervision, including, among other things, the sending out of bills and the collection of all dues, handling of bank accounts, issuing all checks and many other duties in connection with his responsible office. The standing committees have done a fine job and you have already seen the result thereof in part in connection with their reports as published in the last issue of the Journal. Three of these committees have arranged most interesting forums for tomorrow afternoon and about which you will hear more later on. Pat Carey, Chairman of the General Entertainment Committee, assisted by Mrs. Milo Crawford, as Chairman of the Ladies General Entertainment Committee, have both done just the sort of job you would expect them to and I want to direct your attention to the fact that it takes a lot of time and work to arrange the entertainment features for our convention and so I know that you vest me with a general power of attorney to express our thanks and appreciation to Pat Carey and Mrs. Crawford and the members of their various entertainment committees.

Just a brief comment and I will conclude this report—Mr. George Maurice Morris, Former President of the American Bar Association has said, "A war may be the most absorbing problem of a generation but the administration of justice is the demanding task of an entire civilization." We are probably beginning to realize more than ever the truth of that statement as the war draws to an end and we are faced with further problems concerning the administration of justice. This statement by Mr. Morris brings up the question as to what, in fact, is now considered the administration of justice. Certainly the administration of justice is now quite different from what it was in many respects even ten and fifteen years ago. And, there does appear some reasonable ground for complaint, if for no other reason, upon the general theory that her blindfold has been slightly shifted to the left in order that she may take one guarded look out of the corner of her eye before pronouncing judgment!

Mr. Justice Roberts a few months ago remarked that "The tendency to disregard precedent has become so strong . . . as to leave courts below without any confidence that what was said yesterday will hold good tomorow." If this is a correct statement, and we must confess that in many respects it is, then it is quite different from the statement of Chief Justice Greene of Rhode Island, when many years ago he said, "The law is progressive and expansive adapting itself to new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled." (1. R.I. 356—quoted fly leaf C.J.S.)

As will be observed, Chief Justice Greene fully recognized that while the law must adapt itself to new relations consonant with the progress of society, yet, he recognized the fundamental principle that such progress must be by analogy to what is already settled.

Mr. Justice Roberts' statement that the courts are now disregarding precedent is illustrated by a quotation from the opinion of the Circuit Court of Appeals of the Fifth Circuit where the following language was used:

> "The principle of stare decisis in constitutional interpretations has recently received shattering blows in the Supreme Court, and especially in the field of immunities from general taxation. The increasing social burdens assumed by our governments, both State and national, will require increasing and more searching taxation for their support. Any immunity from equal general taxation appears more and more inconvenient and unjust. The recent reexamination of the basis for such immunities has resulted in an upheaval. The current of authority has been turned. For the judicial navigator the cases are no longer the

beacons marking out a fixed if tortuous channel. He must for awhile fix his eyes anew upon the Constitution as the pole star of his firmament and steer his course rather by principle than by precedent." (A. H. Stone, Commissioner, v. Interstate Natural Gas Company, 103 Fed. (2d) 544, 549, opinion by Mr. Justice Sibley.)

We, of course, all recognize that the law is not, and of necessity cannot be an exact science. As Chief Justice Greene said it is progressive and expansive, or, in other words, it is elastic and at times highly elastic. Some comfort may be found in the last sentence of the above quotation from the Fifth Circuit Court of Appeals to the effect that the judicial navigator "must for awhile" fasten his eyes anew "upon the constitution as the pole star of his firmament and steer his course rather by principle than by precedent." The sentence is somewhat remarkable in two respects, first, because the reasonable inference is that this sort of judicial legislation is to continue only "for awhile". The second, and even more remarkable thing about this sentence is the statement that the judicial navigator must steer his course "rather by principle than by precedent". We had always heretofore considered that precedent had been arrived at as a result of the application of a sound principle. But, here the court seems to indicate that instead of principle and precedent being necessary corollaries to each other, that one, in fact, is the antithesis of the other. The inference further is that precedents heretofore established, and which must now be disregaded, were arrived at improperly and not upon sound principle.

Another unusual sentence in the quotation is the statement that, "Any immunity from equal general taxation appears more and more inconvenient and unjust." It would seem that this statement would sound much more logical if the word "inconvenient" was deleted, because with it being present it appears that in reaching a decision by principle rather than by precedent, that the principle referred to is to some extent at least influenced by the inconvenience which would be occasioned by following precedent.

I have directed your attention to these matters for one principal reason and that is the hope that such a process of reasoning may be attributed to the unusual conditions existing throughout the world in recent years and the further hope that instead of becoming depressed and discouraged, that, on the other hand we will be inspired to greater efforts as lawyers and officers of the court to restore the sound principle of stare decisis so that we may return to the time when we can advise a client upon the basis of precedent rather than a principle brought on or influenced by temporary existing conditions or inconveniences. The solution to this problem reminds me of an experience I recently had when walking down Capitol Street in my own city —I overtook a couple of my colored brethern and as I approached them it was apparent that they were engaged in a deep and weighty discussion. As I drew nearer and overtook them I heard one remark to the other, "What we needs is a everlasting peace both individually and collectively." Undoubtedly, that is our greatest present need and how to accomplish it is certainly our greatest present problem. And, while it does in fact seem that at the present time we are getting the maximum elasticity from the courts and the administrative departments, yet, we should not become too pessimistic because that same quality of the law—its elasticity—which permits it to be stretched to seemingly unbelieveable extents, will by its same force when stretched too far snap back to a normal and practical position. But, in spite of these temporary departures from apparent settled principles and precedents, I seek no change of venue to any other land, and I still will hold firmly to our Constitution and form of government and forever salute with pride and gratitude the stars and stripes, which is now, and may God grant, will forever be the symbol of the land of the free and the home of the brave.

Report of The Executive Committee

By Willis Smith, *Past President*
Raleigh, North Carolina

THE Executive Committee met here in Chicago on January 27, 28 and 29 in the regular Mid-Winter Annual Meeting, and we transacted such business as you may generally understand comes before the Executive Committee.

Prior to that time, we had had a meeting of the Committee down in Jackson with respect to the general change in the set-up of the Secretary's office and the Treasurer's office, of which all of you I am sure have heard. At the January meeting, we checked on how that plan was working out and it seemed to be doing as well as we could hope or expect, and even better, so far as we can see; up to the meeting of the Committee the night before last, the new arrangement has been working quite admirably and the Secretary and the Treasurer seem to be working harmoniously and each in his own sphere, and I can commend them both for the fine work that they have done.

At the Executive Committee meeting the night before last, the question was raised for the first time as to whether or not this Association should admit as members, lawyers who are ladies. We had not been faced with that problem before, but it was unanimously agreed that if a lady who was a duly licensed practicing lawyer and who met the requirements of eligibility such as all of us had to meet, applied for admittance, then there was no reason why such a person should not be admitted to membership in this Association. Of course, we felt that with respect to a good many members it would help to improve the tone of the organization also.

At these Committee meetings, we surveyed the financial situation of the Association, of which you will hear from the Treasurer's report, and, as all of you know, the Association is in very, very good financial condition. We had a committee to check, audit and approve the records of the Treasurer's office and we found them in excellent shape.

The main matter that I wish to call your attention to is the amendment to the By-Laws with respect to members who may change their position with insurance companies. This is particularly with reference to the members of the Association who are connected with insurance companies. It was brought to our attention in connection with our good friend, Mr. E. A. Roberts, who had been a regular attendant upon our meetings for a great many years and who, as you all know, was a popular member of this Association. He was "kicked upstairs" to the Presidency of the Fidelity Mutual Life Insurance Company of Philadelphia and we didn't think just because one of our members had been pushed up that way that he should have to give up his membership in this Association, and I am confident all of you will agree with the Executive Committee. So we offered the amendment to the By-Laws which was published in the April *Journal* and which doubtless all of you have read. I shall read the one short paragraph that deals with this subject:

"Where a member ceases to devote a substantial portion of his work to the representation of insurance companies, or retires from the practice of law temporarily or permanently, the Executive Committee may, upon his application, continue his membership in the Association or strike his name as a member, as the facts may justify."

Now, that was the reason and there were other cases also of other members. I happen to think of Mr. Roberts because that was the case that I think first raised the question, but that is the reason the Committee suggested the adoption of that amendment to the by-laws.

We have no other formal report to make, because all of the other activities of the Executive Committee have been covered or will be covered by the report of the Secretary and Treasurer and the President, and we did not deem it either necessary or, in fact, in good taste to attempt to rehearse what they were going to say or to discuss those matters which were going to be discussed in their report.

Since we have reached Chicago, in the last day or two, we have heard the news of one of the oldest members of this Association having just passed away, Mr. Ralph Potter. I mention him because at the first convention I attended, which was here in the City of Chicago a good many years ago, Mr. Potter at that time was a very active member of this

Association and, as I recall him and as I knew him, he did a great deal of work for the Association during those early years and was a most influential and interested member, and so I mention that in order that those of you who did know him may know of his passing.

I believe, Mr. President, that is all the Committee wishes to report at this time and I thank you all.

Report of Secretary

By David I. McAlister
Washington, Pennsylvania

THE report of the Secretary as to the number of members—the enrollment at our 1943 Convention was 1242, that is, the total enrollment of the Association. New members taken in since the last convention, including the Executive Committee session of Wednesday night, 112. One member reinstated. A total of 48 have either resigned or been dropped for non-payment of dues and there were 22 deaths in the Association, giving a total enrollment at the present time, as of Wednesday night, of 1285.

Broken down into the various classifications, I believe it has already been mentioned that the members of the Association who are in the military service do not pay any dues; the dues have been remitted for the duration of their military service. There are 111 of our members in the military service. We have a total of 269 Associate Members and 905 Regular Members, giving a total of 1285 members of the Association.

I am very pleased to report to you that so far as our records show, there may have been some that failed to register, but that of the 112 new members, 31 are present at this Convention, or more than 25 per cent. They will be introduced later this morning.

Report of Editor of The Journal

By George W. Yancey
Birmingham, Alabama

MR. PRESIDENT, I have been rather impressed with this comprehensive coverage. At breakfast this morning, several of my friends seemed to be just a little bit worried because of loss and liabilities incurred last night or this morning early, and my good friend Albert here has so explained this comprehensive coverage that I am sure they don't have to worry any more about the losses of last night or the liabilities that they incurred in certain activities.

Seriously, I have no report. If I were to say something nice about the *Journal* or try to build it up, of course, that wouldn't be proper. I could criticize the *Journal*. That would be the easiest thing to do, but, as you know, the *Journal* is under the direct supervision of the Executive Committee. We do not pay for articles from anyone and all of the contributions are voluntary and most of them come from the members. Therefore, the *Journal* reflects the interest of the members in the Association.

Of course, lawyers are very busy and at one time it was quite difficult to obtain articles. I am happy to say, though, at the present time I have some five or six articles that I am holding for future issues, and I want to take this occasion to thank our President, our Secretary, our Treasurer, and the members of the Executive Committee, and members of the Association who have assisted me in the handling of the *Journal* this past year. We have been very fortunate in that our President has been most active, as well as our Secretary and our Treasurer. The three officers have cooperated and worked together and I want to pay tribute to the work that your President and your Secretary and his assistant, and your Treasurer, have done this past year.

Report of Treasurer

By Robert M. Noll

RECEIPTS

June 15, 1943—Balance on hand—cash and Series "G" Bonds, etc.	$25,851.67
Interest on Savings Accounts—The Citizens Bank Co., Beverly, Ohio; Bartlett Farmers Bank, Bartlett, Ohio	15.56
Interest on Series "G" War Bonds—$15,000	187.50
Journal Subscriptions	7.34
R. B. Montgomery—Closing out Petty Cash fund	2.36
Dues collected for 1943	1,889.60
1944—Interest on Savings Account—The Citizens Bank Co., Beverly, Ohio	36.80
Journal Subscriptions	77.72
Interest on Series "G" War Bonds—$15,000	375.00
Refund—Premium of Fidelity Account	1.58
Dues collected for 1944	10,968.50
Total Receipts	$39,413.63

* * *

EXPENDITURES

Convention, 1943	$ 3,042.34
Secretary—Rich'd B. Montgomery	418.98
Assistant to Secretary	471.05
Secretary—David I. McAlister	1,241.43
Treasurer—R. M. Noll	736.26
Journal	3,865.90
Convention, 1944	8.00
President—Smith	83.94
President—Eager	50.57
Incidentals	62.70
Express	1.93
Printing and Stationery	284.33
Legislative Committee	34.25
Special Meeting	399.44
Refund to Members	135.00
Mid-Winter Meeting	1,699.64
Luncheon—N. Y.	12.18
Total Expenditures	$12,547.94

* * *

RECAPITULATION

Total Receipts	$39,413.63
Total Expenditures	12,547.94
Balance on Hand, 7/31/44	$26,865.69

The above balance, $26,865.69, is deposited as follows:

The Peoples Banking & Trust Co., Marietta, Ohio, checking account	$7,828.33
The Citizens Bank Co., Beverly, Ohio, savings account, which draws 1% interest	$4,037.36
"G" War Bond, No. 83267-G, registered in the name of "R. M. Noll, Treasurer, The International Association of Insurance Counsel"	$5,000.00
"G" War Bond, No. V-212522-G, registered in the name of "International Ass'n of Insurance Counsel, R. M. Toll, Treasurer, Peoples Bank Bldg., Marietta, Ohio, an unincorporated Ass'n"	$5,000.00
"G" War Bond, No. V-188733-G, registered "International Ass'n of Insurance Counsel, Marietta, Ohio, an unincorporated Ass'n"	$5,000.00

Respectfully submitted,

R. M. Noll, *Treasurer*

Marietta, Ohio
July 31, 1944

Mr. R. M. Toll, Treasurer,
The International Association of Insurance Counsel, Marietta, Ohio

Dear Sir:

I have audited your accounts as Treasurer of the International Association of Insurance Counsel from June 15, 1943, to July 31, 1944, inclusive, as the same appears from the itemized statement of receipts and disbursements attached hereto consisting of eleven (11) pages.

I have further examined the Bank Books and find that all cash was deposited.

I find that all payments have been made by check. I have examined the cancelled checks, compared them with the check stubs and find them all to be correct. I also find the billings for each check issued to be in the amount thereof.

I also examined the dues and membership records formerly handled by the Secretary. All receipts check with deposits and all dues have been properly posted to individual accounts. Total amount received for dues was $12,858.10. Refunds for overpayments and dues remitted for members in Military Service were

$135.00. Delinquent dues as of July 31, 1944, are 62.

I have also reconciled with the banks the balance as stated and find them to be as follows:

The Peoples Banking & Trust Co., Marietta, Ohio, checking account $7,828.35
The Citizens Bank Co., Beverly, Ohio, savings account, which draws 1% interest $4,037.36

There has also been exhibited to me by R. M. Toll, Three (3) "G" War Bonds, numbered and described as follows:

"G" War Bond, No. 83267-G, registered in the name of "R. M. Noll, Treasurer, The International Association of Insurance Counsel" $5,000.00
"G" War Bond, No. V-212522-G, registered in the name of "International Ass'n of Insurance Counsel, R. M. Toll, Treasurer, Peoples Bank Bldg., Marietta, Ohio, an unincorporated Ass'n" $5,000.00
"G" War Bond, No. V-188733-G, registered "International Ass'n of Insurance Counsel, Marietta, Ohio, an unincorporated Ass'n" $5,000.00

$26,865.69

The Treasurer also has in his possession two (2) policies of Insurance as follows:

National Union—Policy No. 5026—Furniture and Fixtures in the amount of $2,000.00 (Secretary's Office in Washington, Pa.)
National Surety—Policy No. VP 1069677—Valuable papers coverage—(Secretary's Office in Washington, Pa.)

Respectfully submitted,
CECIL C. DYE, *Public Accountant*
Marietta, Ohio
July 31, 1944.

Regulation of Insurance—Some Recent Trends

BY C. C. FRAIZER
Director of Insurance of the State of Nebraska
Lincoln, Nebraska

IT REQUIRED considerable time for me to solve the mystery surrounding the emotional change of an individual invited to deliver a paper or make an address, between the time the invitation is extended and happily accepted and the moment of the delivery of the address or the reading of the paper. Here is what seems to happen:

Some congenial soul, perhaps a brother in the legal profession, full of warmth and human affection extends the invitation and the innocent victim under the magic spell of his kindly eye has accepted before he quite realizes what has happened to him. Then comes the cold dawn of reality. A few days later someone, with a perfect right to ask, coldly inquires, "What is going to be the subject of your address or your paper?" The fellow who invited you has gone, and the warmth of the whole thing has become chilled, and here comes this inquiry and it is a proper inquiry because if one is going to talk, he should certainly have a subject.

Well, the subject having been announced, that obstacle is hurdled, but pretty soon other things happen. The chairman makes it known that he would like to have a couple of copies of the address or paper well in advance of the meeting. Maybe you had figured on completing your preparation a few hours before the event itself, but that is now out because the chairman wants at least a couple of copies in advance, and his request is a reasonable one.

Then maybe two or three insurance publications, having a perfect right to believe that your paper or address is well along in the course of its preparation, drop you a line or card saying that they would like to have copies several days in advance of the meeting, pledging not to previously print or release the same (and their record in this regard is perfect so far as I know).

Then you are really up against the cold reality and you realize that you have undertaken to talk to some of the smartest insurance lawyers in the United States, most if not all of whom are specialists—experts—and what started out to be a very warm, happy relationship turns into a period of wondering what in the name of Heaven you are going to say.

Well, realizing that undoubtedly all of you have made intent studies of particular phases of insurance law, my contribution must be

an effort to picture state regulation of insurance in a broad sense. State regulation is my present job, and I regard myself as a lawyer with a very important client, namely, the Insurance Department of the State of Nebraska.

The Insurance Commissioner views the insurance picture as a whole. This morning he was thinking and discussing life insurance, after lunch maybe a fire problem, followed by a problem of casualty insurance. The Insurance Commissioner may have to turn suddenly from a conference full of the great spirit of trusteeship shown by the vast majority of our fine life insurance company officials, to a small thinker insurance-wise. The latter can cause more annoyance to the Insurance Department in an hour than the trustee may cause in two years.

My point is that there is a veritable parade of all types of insurance activity passing through the office of the State Insurance Department. So what are some of the things to observe in this parade. Most of the real work of the Insurance Department and Insurance Commissioner is not of a spectacular nature. It is rather the daily routine, often the daily grind, that is most important.

The newspaper reporters who cover the Capitol at Lincoln call on me daily and ask for a story. While we make every effort to supply the press with suitable, proper and legitimate news releases, yet we are very limited. If a company goes into receivership or liquidation then you have a definite story for the press which is legitimately entitled to publicity, but these are few and far between. If some ruling of major importance is made by the department, publicity is often desirable; but those conferences or hearings relating to company examinations, the withholding of a company license, agency complaints, unproven complaints relating to discrimination, twisting, rebating and the like, cannot be the subject of a headline. Ill-advised publicity in such cases might often lead to gross injustices and great hardships.

One of the interesting things about being insurance minded is the wide variety of experience involved. These experiences range all the way from the solemn and serious planning of estates through life insurance to the coverage on the life of America's Thanksgiving turkey. It appears to be much easier to plan a life insurance estate program for a big business executive than it is to insure the life of the comparatively humble turkey. This interesting bird, at least when raised domestically, does not seem to have the instinct for self-preservation that all animal life is supposed to have. In times past, thousands of turkeys have been smothered in storms. We are told that the turkey is dumb. When a storm approaches, turkeys refuse to go to shelters but fly up into trees and perch there until they are frozen or drop to the earth and are smothered in great numbers. Nevertheless, turkey raisers want turkey insurance.

Insurance is unique and considerably different from other businesses in that the public purchases items of merchandise in any one of the many stores or shops and if the price is low, even ridiculously low, the public has a perfect right to purchase, and if the storekeeper or the shopkeeper goes broke, the public is not particularly concerned and no one is hurt except the proprietor. However, if an insurance company sells its contracts at too low a premium and thereby fails, the public or a very large portion of the public consisting of its policyholders is seriously affected. Consequently, insurance regulation has at least two objectives. First, to have the price right, and, second, to keep the company solvent.

TRENDS—LIFE INSURANCE

During the past few years there has been what we might call, from the Insurance Department's point of view, improvements in the the life insurance field. Many of these changes have brought about a better understanding and a much greater degree of confidence by the public.

For some years, the sentiment has been growing among the American people who are buyers of life insurance that the mortality tables used by the companies were old and obsolete, and that there was need for a new, up-to-date, modern table. The mortality table that was permitted by many of the states and used by the majority of the companies was the American Experience Table of Mortality, which was first published in 1868 and was based on the experience of one New York company. Some years ago another mortality table was compiled, known as the American Men Table, from the experience of fifty-nine companies for the period of 1900 to 1915. This table was only adopted by a few states, consequently, it was not used by many of the life insurance companies.

Several years ago, the National Association

of Insurance Commissioners appointed a committee to study the need for a new mortality table and related topics, and after much study, this committee submitted for adoption a new mortality table called The 1941 Commissioners' Standard Mortality Table. This table was compiled from the actual experience of something like ninety per cent of the insurance in force in the United States during the period of 1930 to 1940, inclusive. Since this table has been adopted by the National Association of Insurance Commissioners, many states have already adopted it.

The fact that within a few years many life insurance companies will be using this table in their policy forms will go a long way in establishing the confidence of the policyholders.

Many life insurance companies the past few years have made an earnest attempt to the best of their ability to revive their various policy forms in order that the policyholders will have a clear understanding as to what the various provisions in the policy mean. This has been done by using language which the ordinary person will more clearly understand, and also by using a clearer-faced type in the printing of the policy contract.

After Pearl Harbor, it became apparent that it would be necessary for life insurance companies to insert in their various policy forms restrictions relating to war and aviation hazard. In August, 1942, the executive committee of the National Association of Insurance Commissioners adopted a somewhat standard clause covering uniform war and aviation restrictions in life insurance policies. The large majority of the life insurance companies have followed these recommendations in drafting their war and aviation clauses. This clause is much more liberal than the clause used by life insurance companies during the first World War. The plan of giving men in the service full coverage as long as they are located in the home area, which means the forty-eight states of the United States, District of Columbia, Canada and Newfoundland, has gone a long way in the modern trend of life insurance industry to establish itself favorably with the American people.

There has been a trend the past few years of many life insurance companies toward making a greater effort to sell insurance on juvenile lives. This has been brought about to a certain extent by the fact that many millions of prospects are now in war service, but it has also to a certain extent been brought about by the fact that the companies' mortality experience on juvenile insurance has been very favorable. The results show that life insurance companies are today selling a large volume of insurance to this class.

At the present time, there appears to be great activity in the life insurance field in the selling of insurance to employers on the lives of their employees. These cases are commonly known as Pension Trust insurance, and their purpose is to provide for a pension for the employees. The employers in many cases are now in a very good position to spend the amount of money required for the purchasing of this type of insurance because of the savings in federal income taxes. The Treasury Department passes upon each plan submitted, for the purpose of approving or disapproving such deductions from the net profits of the company, before the payment of the federal income taxes.

TRENDS—FIRE AND CASUALTY

The powers of an insurance company to write various lines and coverages are of course controlled by its charter or articles of incorporation and by state statutes. As early as 1871, the multiple lines and broad coverages program was under discussion by the insurance industry and by state insurance departments.

In 1914, Honorable Burton Mansfield, Insurance Commissioner of Connecticut, discussed the subject in great detail, and in 1929, Honorable Howard P. Dunham, also Insurance Commissioner of Connecticut, reviewed the history of insurance thinking in this regard, and within the past year this subject has received intensive attention.

Actually multiple line broad coverages are now available to a considerable extent. A few states authorize such writings by either a fire company or a casualty company.

The State of Connecticut has granted charter powers that permit some of the most important insurance groups in the country to write coverage for almost any economic loss, and these companies advertise the ability of their groups to do so.

Insurance carriers are almost daily filing with every Insurance Department in the United States contracts including "comprehensive insurance." The companies love to use this expression.

An insured may now obtain in one policy coverage for any loss he may suffer by reason of injury to an employee whether the liability acrues under the Workmen's Compensation Act or under Employers' Liability. Blanket crime policies are available to protect the insured against all losses due to dishonesty of employees or criminal acts of others. "Glass" policies are available to cover every risk relating to glass. "Comprehensive Personal Liability" policies afford complete coverage for the individual and his family. I believe the broadest policies I ever personally examined are the "Army Post Exchange" and "Navy Ship Service" policies.

Many companies go just as far as they can, subject to the limitations of charter or corporate powers and subject to the limitations of various state statutes. It is often pointed out by opponents of the multiple lines program, and is recognized by friends of the program, that we are not dealing with a business on its threshhold but that we are dealing with an insurance business which has been developed over a period of many years. The inference is that if the insurance business were originating today, we would have all coverage insurance (except possibly life).

Broad coverages would not be compulsory under the proposed multiple lines program. Anyone desiring narrow coverages could still obtain them. But broad coverages would be available to meet the growing public demand therefor.

While it is the primary duty of state insurance departments to regulate insurance, the insurance commissioner as a public servant is also interested in better and more simplified insurance coverages for the public. Many insurance commissioners are for the multiple lines program enthusiastically, others believe in it but do not care to crusade for it, and so far as I know, not a single commissioner is actually opposed to the movement.

People interested in insurance might well give some future thought to reciprocals. As I understand it, reciprocals were originally created by insureds of the same class or type, such as lumber yards, greenhouses, and department stores, et cetera, the original idea being for the subscribers to make deposits for the actual cost of protection of properties within their own class, rather than miscellaneous properties of all kinds and nature, and apparently expecting an economy of management through an attorney-in-fact. However, it appears that many reciprocals have long since departed from the original plan and now compete with commercial companies and have an unfair advantage over commercial companies which must comply with many statutory requirements from which reciprocals are exempted. I have often wondered what would happen if someone would attack in court the paper set up of some of these reciprocals and ask the court to go to the substance and ignore the form.

Another interesting item came to our attention when the new 1943 New York Standard Fire Policy became the subject of discussion. In the year 1913, the Nebraska Legislature enacted a provision adopting the then New York Fire Insurance Policy Form as a Nebraska (minimum) standard and the Legislature added that the New York Standard as thereafter constituted should also apply.

Our court many years ago held that the attempt to adopt the New York Standard as *thereafter* constituted was an unlawful attempt to delegate legislative power. Consequently, when the new New York Fire Form of 1943 became available, our department did not have the power to compel its filing and use. Our department believed that the new New York form was desirable and much more liberal than the old New York form, and we were asked repeatedly in effect why we did not *compel* its use. The answer was that the only thing we would compel was the old New York form. Under our discretionary statute, we had a perfect right to *approve* the new form, which we promptly did, but we could not compel it. However, the discussion soon became academic because practically all of the companies have filed the new form.

I realize that most of you are not particularly interested in what happens in Nebraska, but I was very much impressed by the fact that in this decision our Nebraska Supreme Court apparently had the sole thought that companies might desire to give policyholders less than the old New York Form minimum standard, but it apparently never occurred to our court that the companies might be ready and willing at some future time to give the policyholders better and broader coverage than established in the old minimum standard.

Practices in the field of health and accident insurance continue to improve. The adoption by the National Association of Insurance Commissioners of an official guide establishing uniform policy provisions and uniform

practices in this field of insurance has been a real forward step. Health and accident insurance has attained the decency and dignity which its high purposes deserve.

AFTER-WAR PROBLEMS OF INSURANCE REGULATION

It is doubtful if anyone can foresee what will be the after-war problems of an insurance commissioner, anymore than anyone could foresee some of the war problems. Prior to Pearl Harbor, I was not particularly interested in what powers, if any, my Insurance Department had with regard to military reservations. However, it was only a short time before we found ourselves scanning the Constitution of the Unites States, the statutes of Nebraska, and the decided cases, in the preparation of a memorandum brief to the effect that agents soliciting insurance business on military reservations in our state must be licensed by our Insurance Department.

Insurance regulation parallels activity in the insurance industry. At the war's end, will the present increases in volume of new life insurance, accident and health insurance, as well as other lines continue, or will there be a period of downward sales trends? When insurance agents now in the armed forces return to civil life, will we have less insurance written by more people? Are the companies keeping their organizations sufficiently elastic so that they can adjust themselves to any foreseeable trend?

I am inclined to be apprehensive regarding the return to the ranks of licensed insurance agents of many "marginal agents" who have temporarily left the insurance field and attained lucrative employment in war industries. Likewise with regard to some small-time promoters. Possibly insurance departments can keep some of these marginal cases permanently out of the insurance business.

Will the health of the nation be affected by the return of members of the armed forces from remote and disease producing portions of the world, and will sickness insurance and life insurance eventually be affected?

If the return of members of the armed forces can be budgeted into a gradual and orderly homecoming, then surely the national fabric can absorb them more easily and with less confusion than occurred after World War I.

Probably most people believe that insurance, generally speaking, will become more international at the close of the present war. The fire and casualty field, in advocating the development of the multiple lines program, is definitely planning for more world-wide business, and life and health and accident insurance may find business abroad to an extent previously undreamed of. Someone has said: "No spot on earth is more than 60 hours flying time from your local airport."

INVESTMENTS OF INSURANCE COMPANIES

It is remarkable how sometimes the most discouraging investments end up in good shape. Life insurance companies in the year 1943 sold one hundred fifty million dollars worth of city property which had been acquired under mortgage foreclosures during the depression. In the years since 1929 nearly a billion dollars worth of city housing properties came into the possession of the companies through mortgage defaults, about half of which were individual homes and about half apartment houses representing housing for nearly one million persons. Most of these properties have now been sold with no over-all loss to policyholders. Although the properties were sound investments, apparently, when the mortgages were taken, the depression caused foreclosures and also caused deterioration of the properties. Many of the properties were rehabilitated by the companies. As a result of the rehabilitation, most of these properties were returned to full community usefulness and became income producing for the benefit of the owners.

Continued mortgage financing will undoubtedly be one of the most important post-war jobs to be undertaken by insurance companies, particularly life insurance companies.

So it appears that within a period of some fifteen or more years a cycle has been completed which at one time was most discouraging to insurance companies. Mortgage loans were made and appeared to be excellent investments, the depression came, foreclosures followed, the companies acquired far too much real estate thereby, the companies rehabilitated the same at least in part, then resold the properties and now to a considerable extent hold mortgages on the same properties, but presumably on a much more conservative basis.

Of course, there was no answer to the problem of the absurd over-loan on inferior property. But these losses have been surprisingly small.

You will recall that total failures in life insurance have been less than one per cent, a truly remarkable record.

TRENDS IN UNAUTHORIZED INSURANCE

Unauthorized insurance is sold by radio, newspaper advertising and by direct mail.

Various states take different steps with regard to this troublesome subject.

Again assuring you that I do not want to talk too much about Nebraska, I take the liberty of mentioning our departmental activities merely as an example of a state program. Our department has an agreement with all Nebraska radio stations and with all Nebraska newspapers that they will not advertise insurance in unauthorized or non-admitted companies. So far as is known, the radio stations and newspapers have conscientiously carried out this agreement in the interest of public welfare, realizing that there are an adequate number of admitted and authorized companies to supply the legitimate market and realizing that unauthorized companies are not subject to service of process in a suit in our state on a disputed claim.

You may be interested at this point to know that the Insurance Department of the State of Missouri some months ago caused all Missouri insurers doing business by mail or radio or through newspaper advertising in states in which they were not admitted, to agree to submit to service of process in the courts of such states, with minor exceptions. Information does not reach me as to whether there is any activity under this plan at the present time, and, if so, how the plan has worked out. It is a unique and interesting experiment.

The National Association of Insurance Commissioners for many years past has struggled with this problem. The National Association prepared a uniform bill for adoption in the various states—and it has actually been adopted in whole or in part in several states, but time and space do not permit going into the details of this bill. This uniform bill may eventually solve the problem.

In the National Congress there has been pending for the past several years the so-called Hobbs bill, making it unlawful for unlicensed companies to use the United States mails to sell insurance. However, there has been little sentiment in favor of enactment, it being argued that the bill would not accomplish the real purpose intended, and in the background has been the desire to remain away from any federal regulation of insurance, and very importantly it has been argued that the enactment of the bill would work a real hardship on a large number of companies which are sound financially and whose practices are decent but which conduct their business without the benefit of admission to states other than their own domicile and without benefit of agents, and through the mails only. The various commercial travelers insurance organizations come within this classification, as well as other business and professional classifications of insureds.

Personally, I believe that what has actually been a campaign of education within the ranks of the National Association of Insurance Commissioners has been most beneficial. Insurance commissioners and members of their departmental staffs are human, and surely in time all departments will respond to this campaign of education and see to it that their own home companies engage solely in reputable practices.

However, non-admitted companies have a perfect legal right to advertise on the radio and in the newspapers and by direct mail.

There is no answer to the seductive voice of the radio announcer. At our department we have examined the script of radio advertisers and found the script in black and white to be technically truthful, although not always telling the whole truth. However, this situation is not peculiar to the field of insurance. Who has not listened to the same eloquent and convincing tone of the radio man when he is selling tooth paste, cigarettes, soaps and remedies for hangovers? Of course, seriously, insurance is not an ordinary commodity and should not be advertised in other than the most truthful and accurate manner.

Insurance is made by Lloyds of London in Nebraska (and undoubtedly the same is true in many other states) through a limited number of agents specially licensed and under very special restrictions. There is a comparatively high agents' license fee, bond must be given by the individual agent to insure payment of premium taxes to the state on such business, and showing must be made under oath that the coverage cannot be obtained in admitted and authorized companies.

Lloyds files a power of attorney authorizing service of court process upon such special agents.

TRENDS IN RETALIATORY LAWS

No doubt, the retaliatory laws of the various states, practically all of which have them, have been on their respective statute books for many years and with little change in phraseology. However, I venture the belief that there has been a more intelligent, a more cooperative, and a more uniform enforcement by the individual states of their respective retaliatory laws in recent years than in the past. Large insurance companies doing a nationwide business in all or most of the states should not be harassed by a vindictive, mischievous or careless, enforcement of the retaliatory laws. With regard to taxes, non-resident agents and brokers licenses, and possibly in a few other instances, there are at present wide differences in the statutes of the various states. The National Association of Insurance Commissioners is constantly studying methods to improve this situation.

* * *

EFFECT OF DECISION IN SOUTHEASTERN UNDERWRITERS ASSOCIATION ON CERTAIN PHASES OF STATE REGULATION

By the decision in the S. E. U. A., the U. S. Supreme Court ruled that the business of insurance is commerce (either interstate or intrastate, or both, according to circumstances), and as such, is subject to regulation under Sections 1 and 2 of the Sherman Act. While the court, in its opinion did discuss several phases of the insurance business, and referred to many of the activities of insurance companies, their officers, employees and agents, yet, there were before the court only two questions, namely: (1) Is the business of insurance, conducted across state lines, and in several states, "interstate commerce"; and (2) Are the activities of insurance companies, which are multistate in character, subject to the provisions of the Sherman Act. Mr. Justice Black, in the majority opinion, said:

> "(2) Two questions and no others, were presented by the record: (a) Was Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes interstate fire insurance trade? (b) If so, do fire insurance transactions which stretch across state lines constitute 'commerce among the several states' so as to make them subject to regulation by Congress under the commerce clause"?

The court held that the business of insurance conducted across state lines constitutes "commerce among the several states," and consequently subject to regulation by Congress. It further held that the provisions of the Sherman Act were intended to be operative against, and to prohibit, the conduct of all persons and corporations, including fire insurance companies, which "restrains or monopolizes" any interstate business or trade, including "interstate fire insurance trade."

By the above decision, the court now says that the business of insurance is "commerce." The decision has produced uncertainty and no little anxiety in the minds of many engaged in the insurance industry, and also in the minds of the several state supervisory authorities. Prior to the S. E. U. A. decision, and since 1868, the United States Supreme Court has repeatedly held that the business of issuing insurance policies is not commerce of any kind.

For more than 75 years, the Supreme Court has said that the main purpose of insurance business is to issue to the assured a simple contract of indemnity against loss, and to receive from the assured a premium therefor. The primary object of the assured is to be protected against certain hazards that might result in loss. It is the principal business of insurance companies to sell indemnity against loss caused by stated hazards. To further that purpose, companies make use of interstate communications and shipping facilities. Applications and premiums are received, and issued policies are transmitted by the mails or by some other means. The policy contract does not become executed or effective until delivered to, and accepted by the assured in his own state. The sale of protection or insurance is completed by assured's payment of the premium, and his acceptance of the policy. Adjustment and payment of incurred losses is merely the fulfillment and execution of contract promises. The primary object of the insurance company is to sell indemnity insurance against stated hazards for a price or stated premium. In all prior decisions the court has looked to the *objectives* of the business, rather than to the *means of accomplishment*, in its determination of whether or not insurance business is "interstate commerce." The means used have been deemed merely incidental to the main purposes of the business. That the issuance of an insurance policy is a personal contract between the parties thereto.

That "the policies do not take effect—are not executed contracts until delivered by an agent" in the state. That they are merely local contracts. (Paul v. Virginia, 8 Wal. (U. S.) 168; Hooper v. California, 155 U.S. 648; New York Life v. Cravens, 178 U. S. 389; New York Life v. Deer Lodge County, 231 U. S. 495).

In Paul v. Virginia, and in at least eight of the cases that followed, the right of the states to impose conditions upon foreign insurance companies seeking to do business there, was upheld upon the following grounds:

1. That the issuance of an insurance policy is not a transaction of commerce. The policies are simple contracts of indemnity against loss, entered into between the corporation and the assured, for a consideration paid by the latter. They are not subjects of trade and barter. They are not commodities to be shipped from one state to another. They are personal contracts completed by their signature and the transfer of the consideration. Policies do not take effect—are not executed contracts—until delivered to the assured in the state of his residence. They are local transactions governed by local law. They do not constitute a part of *"commerce among the several states,"* and

2. Corporations are not citizens within the meaning of Article IV, Section 2, Paragraph 1, and Section 1 of the Fourteenth Amendment of the Federal Constitution. Corporations are creatures of local law. They have no absolute right of recognition in other states, but depend for that and for the enforcement of their contracts upon the assent of those states, which may be given accordingly on such terms as they please. The privileges and immunities secured to citizens of each state in the several states by Article IV and Amendment XIV of the Federal Constitution, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own state are not secured by it in other states.

The principle, "insurance is not commerce," announced in Paul v. Virginia and the cases which followed, has constituted the foundation upon which the major portion of state supervision has been erected. Now that the same court has reversed its former position, and has said that insurance business is "commerce," what is the present status of supervision and regulation by the states?

Mr. Justice Black (majority opinion, S. E. U. A.) referred to the holding in Paul v. Virginia and the cases that have since reaffirmed and followed that holding, and said:

> "In all cases in which the court has made the statement 'the business of insurance is not commerce,' its attention was focused on the validity of state statutes—the extent to which the commerce clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to act without legal restraint."

The court (majority opinion) sought to justify the holding that "insurance is not commerce" to uphold state regulation of insurance business on the theory that there was an imperative need to regulate and correct widespread abuses in the insurance industry. The court went on to say, however,

> "But past decisions of this court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine congressional power under the commerce clause."

In an early case, Crutcher v. Kentucky, 141 U. S. 47, decided May 25, 1891, the court, speaking of an express company engaged in interstate commerce said:

> "To carry on interstate commerce is not a franchise or a privilege to be granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities as matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless *Congress should see fit* to interpose some contrary regulation on the subject . . . We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext for imposing the same may be."

The doctrine thus set out in Crutcher v. Kentucky, supra., has never been specifically overruled or reversed by subsequent decisions of the court. The court further said that Congress alone has exclusive jurisdiction to regulate "interstate commerce," quoting:

> "Congress would undoubtedly have the right to exact from associations of that kind (express companies) any guarantees it might deem necessary for the public security, and for the faithful transaction of business; as it is within the province of Congress, *it is to be presumed* that Congress *has done, or will do,* all that is necessary and proper in that regard."

The Crutcher decision, supra., holds that only Congress has the power to regulate interstate commerce, and, as it is within the province of Congress,

> "It is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard."

In that case, the court quoted with approval from Norfolk and Western Ry. v. Pa., 136 U. S. 114:

> "It is well settled by numerous decisions of this court that a state cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce."

In view of the holdings in the Crutcher, and other like cases, it is feared by many that since insurance business conducted across state lines is now deemed to be "interstate commerce," then all control of such business is taken from the states. Are the state regulations, which for more than 75 years have been sustained by the court on the theory that insurance business is not "commerce," now to be invalidated on the theory that such business is "commerce"? On June 28th of this year, the Federal District Court of Idaho held the state countersignature law to be an unconstitutional restriction on interstate commerce. (Ware v. Travelers.) In commenting on the question of invalidating state regulations, Justice Black said (S. E. U. A. case):

> "Accepted without qualification, that broad statement is inconsistent with many decisions of this court. It is well settled that, for constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities, which, though subject to federal regulation, are so intimately related to local welfare that, in the *absence of congressional action,* they may be *regulated* or *taxed* by the states. In marking out these activities the primary test applied by the court is not the mechanical one of whether the particular activity affected by state regulation is a part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the *continued absence of conflicting congressional action,* the state regulatory and tax laws *should be declared valid.*"

In view of the above observations contained in the majority opinion (S. E. U. A.); and in view of other recent decisions of the court affecting interstate commerce, it does appear, that although the doctrine laid down in the Crutcher, Norfolk and Western, and other like cases have not been specifically reversed, it has been considerably modified. The Supreme Court has sustained a non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in the performance of a sale contract, not upon the ground that the delivery was not a part of interstate commerce, but because the tax was not a prohibited regulation of, or burden upon that commerce. (Wiloil Corporation v. Pa., 294 U. S. 169; McGoldrick vs. Berwin-White Co., 309 U. S. 33; Illinois Natural Gas v. Cent. Ill. Pub. Ser. Co., 314 U. S. 498. In the case of Department of Treasury v. Wood Preserving Corp., 313 U. S. 62, the court held that neither commerce clause nor Fourteenth Amendment prevented imposition of tax on receipts of an intrastate transaction even though the total activities from which local transactions derived might have incidental interstate attributes. In the case of International Harvester v. Department of Treasury of Indiana, 64 S. Ct. 1019, decided May 15, 1944, the court held that where a state seeks to tax gross receipts from interstate transactions consummated within its borders, its power to do so cannot be withheld on constitutional

grounds where it treats all wholly local transactions the same way. "Such local activities or privileges are as adequate to support a sales tax." To the same effect is the case of General Trading Co. v. State Tax Commissioner of Iowa, 64 S. Ct. 1028.

The S. E. U. A. decision is definite and positive authority to Congress, if it so desires, to regulate those phases of insurance business which may be considered as constituting or affecting "commerce among the several states." It is well settled by the courts that a corporation, including an insurance corporation, is an artificial being. It has only such rights, powers and privileges as are defined by the laws of the state of its creation, and by the terms and conditions of its own charter. Special privileges enjoyed by a corporation in its own state are not secured to it in other states. A state may impose such conditions and limitations upon foreign corporations seeking the privilege of doing business in such state as it sees fit. Paul v. Virginia, 8 Wal. (U. S.) 168; Equitable Life Assurance Society v. Pa., 238 U. S. 143; Compania de Tobacos v. Collector, 275 U. S. 87; Philadelphia Fire Ass'n v. N. Y., 119 U.S. 110; Connecticut General Life v. Johnson, 58 S. Ct. Rep. 436.

Although Congress has the power to regulate "commerce among the states"; and although the Supreme Court (S. E. U. A. case) now says that the business of insurance is commerce (intrastate or interstate), the Congress has not thus far made any provision for the regulation of insurance business. The right of a state to impose such conditions upon foreign insurance companies seeking to do business in such state, has been upheld time and again by the highest court in the land.

> "In the absence of federal legislation which conflicts or occupies the field as here, it is within the authority of a state, in the interest of the health and safety of employees, to require a terminal railroad, though engaged largely in interstate commerce, to provide cabooses on trains within the state on designated runs." Ter. Ry. Ass'n. v. Brotherhood of Ry. Trainmen, 318 U. S. 1.

By the same token we may say in the absence of conflicting federal legislation which occupies the field, it is within the authority of the state, in the interest of public welfare, to regulate and impose conditions upon foreign insurance companies doing business in the state and it does not matter that some phases of interstate commerce may be involved. (Terminal Ry. Ass'n. v. Brotherhood of Ry. Trainmen, 318 U. S. 1; Parker v. Brown, 317 U. S. 341. In the majority opinion of the S. E. U. A. case, Justice Black himself remarked:

> "And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the absence of conflicting congressional action, state regulatory and tax laws should be declared valid."

The insurance contract between a foreign authorized company, and a domestic policyholder is in itself a local contract. It may, and often does, involve communications which are interstate in character. The Supreme Court of the United States says that the relation which exists between such foreign insurance company and its domestic policyholder, constitutes doing business in such state. (Equitable Life Assurance Society v. Pa., 238 U. S. 143; Compania de Tobacos v. Collector, 275 U. S. 87; Philadelphia Fire Ass'n. vs. N. Y., 119 U. S. 110.

State laws imposing conditions on foreign insurance companies such as:

1. Those requiring deposits of securities;
2. Requiring examination of a company at the company's expense;
3. Laws prohibiting rebating and discrimination;
4. Laws imposing liability upon agents for making invalid contracts;
5. Laws for the protection of local agents including countersignature;

are all valid exercises of the police power of a state. The welfare of the public in general and of the company's policyholder in particular, demand that all insurance companies doing business in the state be financially solvent and able to meet all policy obligations as well as such taxes and fees as may be lawfully assessed against such company. Such company may also be required to conduct its business fairly, and honestly; and to give to every policyholder or risk of equal hazard, exactly the same treatment. The imposition of conditions 1, 2 and 3 above, are both legal and moral. Such conditions should never be a burden upon "commerce among the several states." On the other hand, the companies

themselves are greatly benefited by such requirements because they tend to increase public confidence in the insurance industry.

Laws imposing liability upon agents for making invalid contracts are not confined to the insurance business. Fraud, or improper conduct may and should be condemned wherever found. The right of states to impose a liability upon an agent who deliberately makes an invalid contract cannot be questioned either upon constitutional grounds or upon any other grounds. Such conditions could never become a burden on "commerce among the several states."

The U. S. Supreme Court has repeatedly upheld the right of states to impose conditions for the protection of the local agent, including countersignature. In a recent case, Osborn v. Ozlin, 310 U. S. 54, decided April 20, 1940, the court speaking through Justice Frankfurter said:

> "1. 'That the regulation is constitutionally within the power of the state, even though one effect of it may be to increase the cost of 'master' policies negotiated by brokers in other states, through which an assured may obtain a reduced rate and commission by pooling all of his risks in and out of Virginia in one contract (Pages 62-65).
>
> 2. 'As a basis for this legislation, the Legislature was entitled to act upon the belief,
>
> 1. 'That by requiring participation by responsible resident agents it would lessen the difficulty of enforcing the Virginia system of insurance regulation and detect unlawful rebating (P. 63).
> 2. 'That the limitation on sharing of agent's commissions would assure the the use of resident agents for the procuring and "servicing" of policies covering local risks—functions which, when adequately performed, benefit the company, the producer, and the assured and, by minimizing the risks of casualty and loss, redound to the benefit of the community (P. 64).
> 3. 'That the agency system in view is better calculated to further the ends than other modes of production.'
>
> 3. 'The regulations are well within the power of the state over insurance against local risks (P. 66)—(Justice Roberts dissents in an opinion and is joined by Chief J. and Reynolds)."

While the court did not have before it the question of any burden upon interstate commerce, it is indicated by paragraph 1 above that the court would, in a proper case, hold that such regulations would be no burden upon such commerce.

As indicated in the beginning of this paper, the only questions before the court in the S. E. U. A. case were (1) Is insurance business conducted across state lines "commerce among the several states," and therefore subject to regulation by Congress? and (2) Was the Sherman Act intended to prohibit conduct of fire companies which restrains or monopolizes interstate fire insurance business? The court answers both questions in the affirmative. It decided nothing else. It reversed only that portion of Paul v. Virginia and the cases which followed, that had held that the business of insurance across state lines is not "commerce among the several states." Its only effect was to hold that Congress might, if it so chooses, regulate such insurance business as might be interstate in character. To date, Congress has made no attempt to regulate insurance business. There are no federal laws which in any manner conflict with any of the state requirements numbered 1, 2, 3, 4 and 5 above mentioned. The Supreme Court of the United States has many times sustained the right of the states to impose conditions and limitations on foreign companies seeking to do business there. This right of the states is not based solely upon the question of whether or not the business of insurance is commerce, because it is within the authority of the state, "in the interest of public welfare" to impose conditions on foreign corporations seeking to do business there, (Terminal Ry. Ass'n. v. Ry. Brotherhood, 318 U. S. 1; Parker v. Brown, 317 U. S. 341; Wiloil Corp. v. Pa., 294 U.S. 169; McGoldrick v. Berwin-White Co., 309 U. S. 33; Ill. Nat. Gas Co. v. Cent. Ill. Public Serv. Co., 314 U. S. 498; Dept. of Treas. v. Wood Preserving Co., 313 U. S. 62; International Harvester Co. v. Dept. of Treas., S. Ct. 1019; General Trading Co. vs. State Tax Com. of Iowa, 64 S. Ct. 1028) and it does not matter that some phases of interstate commerce may be involved (same authorities).

Prior decisions of the court upholding state regulations, and sustaining the right of states

to impose restrictions and conditions on foreign insurance companies doing, or seeking to do business there, have been based in part upon the proposition that the principal object and purpose of insurance companies is to sell policies or contracts of indemnity against losses, and to receive in consideration therefor, a stipulated premium. (Hooper v. Cal., 155 U. S. 648; New York Life v. Cravens, 178 U. S. 389; Phil. Fire Ass'n v. N. Y., 119 U.S. 110; Equitable Life Assur. Soc. v. Pa., 238 U. S. 143; Paul v. Virginia, 8 Wall. (U.S.) 168. The policies, when issued and accepted by the assured, are local transactions governed by local law. (Same authorities.) The above finding or holding by the court was not changed, modified or reversed by the S. E. U. A. decision. In the majority opinion, S. E. U. A. case, it was said:

> "We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not of itself constitute interstate commerce. But it does not follow from this that the court is powerless to examine the entire transaction, of which the contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce."

In all insurance cases involving the validity of state regulations, taxation and supervision, the court has given chief consideration to the object and purposes of the business. It has considered and held that the means and facilities used to accomplish the main purposes as purely incidental thereto. The majority opinion (S. E. U. A.) admits justification of the rule to uphold state statutes in the absence of congressional action, but goes on to say:

> "Past decisions of this court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine congressional power under the commerce clause."

The insurance contract itself is a local contract, governed by local law.

> "Neither the commerce clause nor the Fourteenth Amendment prevented imposition of tax on receipts of intrastate transactions even though the total activities from which local transactions derived might have been incidental interstate attributes." (Department of Treas. v. Wood Preserving Corp., 313 U. S. 62.)

Neither the commerce clause nor the Fourteenth Amendment prevents the state imposition of a tax on premium receipts of foreign insurance companies doing business there, even though the total activities from which the local policies or contracts are derived may have incidental interstate attributes. (Dept. of Treas. v. Wood Preserving Co., supra.) In the absence of conflicting federal legislation which occupies the field, it is within the authority of the state, in the interest of public welfare, to regulate and impose conditions upon foreign insurance companies doing business in the state and it does not matter that some phases of interstate commerce may be involved. (Term. Ry. v. Brotherhood of Ry. Trainmen, 318 U. S. 1; Parker v. Brown, 317 U. S. 341; International Harvester v. Department of Treas., 64 S. Ct. 1019; Gen. Trade v. State Tax Com. of Iowa, 64 S. Ct. 1028.)

Following is an excerpt taken from the opinion in the Polish National Alliance case, also decided on June 5, 1944:

> "In this aspect, the case we have before us presents a wholly new problem of the relation of federal authority to the business of insurance. The long series of insurance cases that have come to this court for more than seventy-five years, from Paul v. Virginia, 8 Wall. 168, to N. Y. Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, have invariably involved some exercises of state power resisted, in most instances, on the claim that it was impliedly forbidden by the commerce clause. Such was the context in which this court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, the states may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the commerce clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation. Compare, for example, Heisler v. Thomas Colliery Co., 260 U. S. 245, with Sunshine Coal Co. v. Adkins, 310 U. S. 381.

"We have, therefore, now presented for the first time not an exercise of state but of national power in relation to the insurance business. And so the ultimate question is whether, in view of the relation between the activities of the insurance business before us and the operation of economic forces across state lines, the constitution denies to Congress the power to say that the interplay of the insurance business and those economic forces is such that its power 'to regulate commerce . . . among the several states' carries with it the power to regulate the conduct here regulated by relevant legislation.

"The process of adjusting the interacting areas of national and state authority over commerce has been reflected in hundreds of cases from the very beginning of our history . . . When the conduct of an enterprise affects commerce among the states is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate."

There is attached to my present paper an Appendix, being the report of the subcommittee on Federal Legislation to the Executive Committee of the National Association of Insurance Commissioners, which report was submitted to and approved by our executive committee at its meeting at St. Louis, Missouri, August 28-29, 1944. This report was prepared after the holding by the subcommittee of numerous conferences and hearings at which all branches of insurance were represented, and after consideration of briefs filed by various associations and interested individuals. It seems to me that the report is a very comprehensive historical review and a clear presentation of the case for state regulation, plus most importantly four specific recommendations for the enactment of Congress of legislation, partly original and partly amendatory, which, if enacted into federal law, would appear to solve the problems created by the Supreme Court decision in the S. E. U. A.

The Appendix was prepared prior to the final refinement of the subcommittee report and the attention of those of you who are interested in detail is invited to the fact that in Recommendation Four (4), where reference is made to an appropriate amendment to the Sherman and Clayton Acts, the following words were inserted later: "Which are regarded as non-regulatory." The commissioners regard this point as of the utmost importance, taking the view that the Sherman and Clayton Acts are of a penal nature as distinguished from the Federal Trade Commission Act which sets up an investigating and regulatory body. In other words, the commissioners desire to emphasize the fact that there shall be *no* federal *regulation*. The commissioners do recognize—and this is my personal interpretation only, although I believe it is correct—that crimes should be punished, whether they occur in the field of insurance, railroading, the grocery business or what not. Of course, if the Supreme Court decision in the S. E. U. A. case stands, and if rehearing is denied, then insurance crimes of an interstate nature may be tried in the federal courts but if rehearing is granted and if the present decision in the S. E. U. A. case is reversed, then the state courts will continue to have exclusive jurisdiction.

LET IT BE EMPHASIZED THAT NO CRIME HAS YET BEEN PROVEN IN THE S. E. U. A. CASE.

Also, in the final refinement of the report, the last paragraph thereof was stricken in its entirety and the following paragraph substituted:

"A number of other matters were brought to the attention of the subcommittee, such as an approach to the general problem by means of a constitutional amendment, as well as the subjects of joint stock ownership and interlocking directorates. The subcommittee did not have opportunity to examine these matters sufficiently to express definite conclusions at this time; however, the subcommittee will continue to explore these and other relevant subjects."

As a part of my presentation, I will comment further upon the report contained in the Appendix.

To summarize: The impact of the recent decision in the S. E. U. A. case has caused doubts and uncertainties to arise. The state insurance commissioners believe that the adoption of their report in principle, implemented by suitable congressional action, will remove these doubts and uncertainties. Undoubtedly the report will be further refined and improved. If my conclusion is correct and accurate that the Insurance Commission-

ers of the United States, and all branches of the insurance industry, are practically unanimous in their approval of this program, then it would appear that the temper of the present Congress will favor the necessary federal enactments and it would be my hope that our senators and representatives, together with their bill-drafting experts, will produce a federal legislative program that will absolutely leave the *regulation* of insurance in the hands of the respective states.

If the Supreme Court denies rehearing, and if Congress refuses to cooperate in the commissioners' program, then I am reminded of a recent quotation in The Saturday Evening Post (where I seldom go to read my law) in which a North Carolina Court is quoted as having said:

> "There is no error appearing on the record except the great error of the defendant in murdering his wife, but this is a mistake beyond our province or power to correct." (State v. Wingler, 1922, 184 N. C. 747.)

I firmly and sincerely believe, however, that state regulation, rather than having been thoroughly murdered as was the wife above, will not only live but will continue to improve under the incentive of the present agitation.

NOTE: Mr. E. D. Gerye, attorney in the Nebraska Insurance Department, did considerable research work in connection with the foregoing paper.

* * *

APPENDIX

REPORT OF SUBCOMMITTEE ON FEDERAL LEGISLATION TO EXECUTIVE COMMITTEE OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Brief Summary of the Status of Insurance Regulation Prior to June 5, 1944

The history of state regulation in the United States began early in the 19th Century when the Commonwealth of Massachusetts passed a statute requiring insurers to file statements of their condition with the Legislature. Gradually the scope of regulatory legislation expanded in this and other states. In 1851 New Hampshire became the first state to create an insurance department.

In 1868 exclusive state regulation was sustained by the Supreme Court in the famous case of *Paul v. Virginia* (8 Wall. 168). The court held that insurance was not commerce and sustained the provisions of the statute of Virginia which gave rise to the litigation. The *Paul* case became a landmark in the insurance field and for seventy-six years was the law of the land, its principle being cited and reaffirmed by the United States Supreme Court not less than twenty-two different times.

Section 8 of Article I of the Constitution of the United States provides that, "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states and with the Indian tribes." The Tenth Amendment to the Constitution provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In view of the principle laid down in the *Paul* case, regulation of the insurance business by the several states developed progressively throughout the years. Every state in the Union, the District of Columbia, and even the territories, has a division or a department devoted to insurance regulation. Unlike some fields of business activity in which there was concurrent regulation by both the federal government and the states, regulation of the insurance business throughout the period under review was conducted exclusively by the states.

This system was of great benefit to the public. The insurance business is essentially a financial institution in which the maintenance of stability is of prime importance. It was long recognized that its regulation should be as stable as the business itself and the decisions of the various state regulatory authorities were characterized by a certainty which enabled the business to make long-range plans and commitments which are so essential to it, the policyholders and the public alike.

All this did not come to pass by mere happenstance. From time to time efforts were made to federalize the regulation of the business.

In 1866 a bill was introduced in the House providing for the creation of a national bureau of insurance as a subordinate part of the Treasury Department. The bill was not passed. (H. R. 738, 39th Cong., 1st Sess., June 29, 1866.)

In 1868 a bill was introduced in the Senate proposing a national bureau of insurance. The bill was not passed. (Senate Bill 299, 40th Cong., 2nd Sess.)

In 1892 a bill was introduced in the House

to create the office of commissioner of insurance. The bill was never reported out of committee. (H. R. 9629, 52nd Cong., 1st Sess.)

In 1897 a bill was introduced in the Senate to declare that insurance companies operating outside of the states of their incorporation were to be deemed engaged in interstate commerce. The bill was never reported out of committee. (Senate Bill 2736, 55th Cong., 2nd Sess.)

In December, 1904, President Theodore Roosevelt, in his message to Congress, suggested that careful consideration be given to whether the constitutional powers of Congress with respect to commerce extended to transactions in insurance.

Shorty thereafter a bill was introduced in the Senate by Senator Dryden to establish a Bureau of Insurance in the then recently created Department of Commerce and Labor. The bill died in Committee. (Senate Bill 7277, 58th Cong., 3rd Sess.)

Again in 1905 President Theodore Roosevelt, in his message to Congress discussed the question of regulating interstate insurance transactions. Consideration of this portion of his message was referred to the Committees on the Judiciary of the House and the Senate.

The report of the House Judiciary Committee, in recommending no action, stated:

> "The question as to the power of Congress to regulate and control insurance corporations created by the States has been squarely and fully presented to the Supreme Court of the United States, and the court has many times held that insurance is not commerce, and that Congress has no power to regulate insurance corporations or their business. The views of the Supreme Court have practically met the approval of the bar and business men of the United States as being in accordance with law and common sense (p. 14).
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> * * *
>
> "If there was any doubt upon the subject, it has been dispelled by the argument made for Federal control. All at once it is voiced throughout the nation that a way out of the difficulty has been discovered, and the happy thought is suggested that Congress can declare insurance to be commerce; and that on account of the great interests involved the Supreme Court will reverse itself and the law of the nation and hold the legislation constitutional. The suggestion is not very complimentary to the Supreme Court that, on account of great interests involved, that tribunal would reverse its decisions for a century, absolutely wipe out and destroy the police powers of the States that have so many times been upheld by that court" (p. 18). (H.R. Rep. No. 2491, 59th Cong., 1st Sess., March 23, 1906.)

The Senate Committee on the Judiciary made a similar recommendation. (Sen. Rep. No. 4406, 59th Cong., 1st Sess., 1906.)

In 1914 and 1915 resolutions were introduced in both the House and the Senate proposing an amendment to the Constitution to the effect that "the Congress shall have the power to regulate the business or commerce of insurance throughout the United States and its territories or possessions." The resolutions were submitted to the Committees on the Judiciary of both the House and the Senate. No report was made on the resolutions by either Committee. (S.J. Res. 103, 63rd Cong., 2nd Sess,; H.J. Res. 194, 63rd Cong., 2nd Sess.; S.J. Res. 58, 64th Cong., 1st Sess.)

In 1933 Senator Robinson of Indiana introduced a resolution calling for an amendment to the Constitution giving Congress the power to "regulate the business or commerce of insurance throughout the United States and all territories subject to the jurisdiction thereof." The resolution died in Committee. (S. J. Res. 51, 73rd Cong., 1st Sess.)

The foregoing history of Congressional refusal to enter the insurance regulatory field, together with a long list of judicial decisions, to which reference has been made, all combined to encourage and accelerate the development of the system of state regulation. But that is not all. Not only did the states rely upon this long and consistent series of judicial and Congressional precedents but so did the business itself. As a result a great institution grew and flourished.

The insurance business has been alert to keep abreast with the everchanging and expanding developments of American social and economic life. As American industry increased in size and complexity the insurance business did likewise. Some idea of the complexity of the business may be gleamed from the fact that the Insurance Law of the State of New York makes provision for twenty-two major kinds of insurance; namely, life, annuity, accident and health, fire, miscellaneous property, water damage, burglary and theft, glass, boiler and machinery, elevator, animal, colli-

sion, personal injury liability, property damage liability, workmen's compensation, fidelity and surety, credit, title, motor vehicle and aircraft, marine, marine protection and indemnity, and insurance of life of property.

This list is by no means all-inclusive. Each of these major kinds of insurance embraces a wide variety of coverages, in some instances running into the hundreds. All of this development has of necessity been based upon affirmative state regulation and the inapplicability of existing federal statutes such as the Federal Trade Commission Act, the Robinson-Patman Act and the Sherman and Clayton Acts.

The Effect of the Decision of the Supreme Court in the South-Eastern Underwriters Case

On July 5, 1944, the United States Supreme Court handed down its decision in the South-Eastern Underwriters case. This decision completely reversed the fundamental basis underlying state regulation of the business by holding that insurance was commerce.

One of the immediate effects of this decision was to make applicable to the insurance business a series of federal acts which will be, in many instances, in direct conflict with the provisions of state laws.

Another effect, and one equally mischievous, was to subject state regulation and the business to a long line of judicial decisions interpreting the commerce clause of the Federal Constitution and other federal regulatory acts enacted pursuant thereto. The practical effect of this may be to impair in some respects the well-established regulation by the states and the conduct of the business itself.

To substitute a case-by-case determination of vital problems for orderly regulation and management can scarcely be regarded as a progressive step. Moreover, companies, boards, officers and employees relying upon what they regarded as the established law of the land, may have become overnight subject to criminal liability—all in the absence of an act of Congress specifically regulating the insurance business.

In directing attention above to some of the major consequences of the decision, the sub-committee's intention is to emphasize the importance of the situation now confronting the states and the industry alike. It is not to say that they constitute the only effects. As a matter of fact, the sub-committee also found that a number of other unfavorable developments have occurred. By this we do not mean the routine readjustment problems flowing from the ordinary court decision; we mean problems jeopardizing the effectiveness of some of the regulatory functions of the states and potentially affecting vital sources of state revenue. The problems created for the insurance industry are equally grave. Those familiar with the industry who predicted endless litigation have already seen their fears in this respect begin to materialize. These and kindred developments cannot but cause concern to those state officials entrusted with the responsibility of administering and enforcing state insurance laws. They know that in the final analysis the insurance-buying public and the public at large will be affected adversely thereby.

It must be apparent to all thinking people that this uncertain and intolerable state of affairs cannot be allowed to continue.

Procedure and Activities of the Sub-Committee

This Sub-Committee on Federal Legislation was appointed by the Executive Committee of the National Association of Insurance Commissioners on October 7, 1943. It was directed to function as a fact-finding body in connection with existing and proposed federal legislation. Logically, when the decision in the South-Eastern Underwriters case was made, the sub-committee's efforts became more intensified. Consequently, pursuant to a resolution adopted at the meeting of the National Association of Insurance Commissioners held at Chicago in June of this year, it undertook the task of making specific recommendaions to the Executive Committee of the Association not later than September 1st of this year.

Notices of its meetings were widely publicized. All interested persons were invited to appear. Requests were made for the submission of memoranda and briefs so that the subcommittee would have the benefit of any technical research made into this problem by others. These were supplemented by public and private hearings at which interested parties expressed their views orally. In addition to these sources of information, the various members of the sub-committee, representing a geographical cross-section of the country, each one the chief administrator of the insurance department in his own state, had available to them the facilities and background of their respective insurance departments, all of them

with histories extending back many decades. All material and evidence presented was carefully weighed.

Declaration in Favor Of State Regulation

As a result of its deliberations the sub-committee found an overwhelming sentiment for the retention of state regulation. The arguments advanced in its favor were compelling. Chief and foremost among them was the fact —undisputed—that because the states are closer to the people than is the nation, they are better able to deal with insurance problems arising in their several jurisdictions.

Second, and of equal importance, is the fact that the insurance business does not lend itself to a rigid, centralized control. Flexibility is of the essence. Regulation must be geared to regional and sectional needs.

A third and equally persuasive reason, although one which flows from the first two, is the record of the business in this country extending back over 100 years, and the service which it has rendered to the public. No industry could have thrived to the extent that the insurance industry has, nor could the public have gained as it has, if either the philosophy or administration of state regulation had been unsound.

Recommendations

The sub-committee recommends as follows:

1. The enactment by Congress of affirmative legislation under the commerce clause of the Constitution by which it formulates its own policy and establishes its own rule to the effect that the regulation and taxation of the insurance business shall continue in the several states.

2. An appropriate amendment to the Federal Trade Commission Act eliminating the insurance business from the scope of that act. We base this recommendation upon the following considerations:

The several states are already empowered by law to deal with improper practices. To permit the Federal Trade Commission to exercise the same power would mean either duplication or overlapping of the same functions. Furthermore, in view of the present trend to expand the area of what constitutes interstate commerce, the Federal Trade Commission might well preempt this field to the exclusion of the states. The public interest requires that wherever possible the functions of government be exercised by that unit of government closest to the people. In this instance it is manifest that the insurance departments of the various states are far closer to the problem and better able to serve than a detached central bureau.

3. An appropriate amendment eliminating the insurance business from the scope of the Robinson-Patman Act. We base this recommendation upon the following considerations:

(a) The Clayton Act, as amended by the Robinson-Patman Act, by its language is intended to apply to commodities. Recourse to the Congressional debates preceding its enactment shows that it was never intended to apply to the insurance business. Indeed, this recommendation is made from an excess of caution to prevent a strained construction of the word "commodities" in the act to include insurance.

(b) One provision of the Clayton Act as amended by the Robinson-Patman Act prohibits the payment of commissions to a broker, a practice long recognized in the insurance industry. It is manifest that Congress never intended to bar the payment of commissions under such circumstances.

4. An appropriate amendment to the Sherman and Clayton Acts excluding from the prohibitions thereof all reasonable cooperative procedures necessary and incidental to the establishment of statistical rate bases, rates, coverages and related matters. We base this recommendation upon the following considerations:

The objective of the anti-trust acts is that competition shall be free and unfettered. The courts have said that agreements to fix prices, no matter how benevolent or well intentioned, are illegal *per se*. Experience has demonstrated that unrestricted competition in the insurance business is not in the public interest. Practically every state in the Union has upon its statute books provisions prohibiting unfair discrimination in rates. If unfair discrimination is to be avoided, there must be reasonable uniformity in the rates. Such uniformity can be obtained only by cooperation in obtaining statistical data and in the promulgation of rates based thereon. This result can be obtained only through concert of action.

The fire, casualty, surety and inland marine aspects of the insurance business differ widely from life insurance. In life insurance the initial rates are based upon a number of factors, including mortality tables. Mortality tables are based upon the certainty that everyone must

die. In the other fields of insurance there is no guarantee that the contingency insured against will occur. As a result the rates can only be estimated, using previous periodic experience as a guide. Since rates in these fields are based upon the law of averages it is manifest that the broader the statistical base the more accurate the average. The experience of individual companies is seldom a reliable guide for rate-making purposes. The structure of the fields of insurance under discussion is based upon these facts of common knowledge. Furthermore, many states have by statutory enactment insisted that companies act in concert for the purpose of collecting statistical data for rate making in order to utilize these established principles—principles, we may add, which are wholly inconsistent with the unrestricted competition contemplated by the federal anti-trust laws. For clarity we point out that in all of the so-called rate regulated states the statutes provide that the rates shall be neither excessive, inadequate, unfair or unreasonable, and appropriate provision is made for deviation from the rate structure for companies showing a justification therefor.

There is a further distinction between life companies and other types of insurers. In the life companies the element of cost can be fixed with such a high degree of mathematical certainty that to sell below the proper rate is to invite insolvency. In other lines of insurance there might be a temptation upon the part of some underwriters to assume that the contingency insured against will not occur. This has been known to result in inadequate rates and eventual insolvency or sharp claim practices. It is the function of the various state insurance departments to prevent these consequences which might happen if the unrestricted competition authorized by the anti-trust acts were permitted.

Furthermore, history has demonstrated that under unrestricted competition small enterprise is at a serious disadvantage. Under cooperative rate-making methods the small insurance company is in a position to maintain its competitive standing, a result which by its very nature supports the continued existence of small companies and new insurance enterprise.

For these and other reasons this sub-committee believes it would be a mistake to permit or require the unrestricted competition contemplated by the anti-trust laws to apply to the insurance business. To prohibit combined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business. We do not regard it as necessary to labor this point any further because Congress itself recently recognized the necessity for concert of action in the collection of statistical data and rate making when it enacted the District of Columbia fire insurance rating act.

The action of the sub-committee in making this recommendation should by no means be construed as condoning any oppressive or destructive practices. It is obvious that any such practices are not in the best interests of either the insurance industry or the insuring public.

We therefore recommend the immediate enactment of remedial legislation to accomplish the recommendations hereinbefore set forth. Failure to provide such immediate legislative relief will be contrary to the best interests of the American people and the insurance industry.

These recommendations if enacted into law (a) will stabilize the industry, as a consequence of which the public will gain; (b) will reduce possible conflicts between the sphere of federal influence and state regulation; and (c) will enable insurers to perform their necessary public functions.

In any business as large and as complicated as insurance. it is manifest that no legislative program can meet every conceivable contingency or development which may materialize. We have not been unmindful of that fact in making the foregoing recommendations. Fundamentally, they are designed to provide a framework upon which immediate legislative relief may be obtained.

The sub-committee also recomends:

(a) The continuing and progressive development of the existing system of state regulation.

(b) That the Insurance Commissioners of the several states recommend that their respective Attorney Generals give favorable consideration to the submission of briefs *amicus curiae* in support of a petition for rehearing by the United States Supreme Court of the case of United States v. South-Eastern Underwriters Association, decided June 5, 1944.

This is consistent with the action of the National Association of Insurance Commissioners when, in full assembly at its June, 1944 meeting, it unanimously made a similar recommendation. Subsequent events have

demonstrated that the apprehensions of the various Commissioners at that time were well founded, and that the problems and dislocations flowing from the decision are far greater than the majority of the Supreme Court contemplated at the time the opinion was handed down.

Another matter brought to the attention of the sub-committee was that of interlocking directorates but it did not have opportunity to explore this subject sufficiently to express definite conclusions.

Respectfully submitted, J. Herbert Graves, Chairman; Charles F. J. Harrington, Newell R. Johnson, Edward L. Scheufler, Robert E. Dineen, James M. McCormack.

Statutory Interpretations

By Benj. Brooks

Vice-President and General Counsel, American Mutual Liability Insurance Co. Boston, Massachusetts

IT was a beautiful Sunday afternoon in April. The Charles, on its leisurely way to the ocean, bore on its bosom many happy canoeists. The music of their gay laughter and conversations mingled with the music of the mating birds, and all nature seemed to be in accord.

In the fore of one of the canoes, as it drifted slowly with the current, sat a handsome young blonde. She was facing the youth with the paddle, but neither of them was any longer giving the slightest thought to the picture of which they were such a real part.

"Ralph," she said, "I have been so certain that I would be called upon to answer the question which you have just given that I have already consulted my father. He not only refuses to give his consent, but promises to cut me completely out of his will if I do marry you. I have seen his will. I am its only beneficiary. He is wealthy, and he always keeps his promise.

"Father likes you but knows that you are bent on following the legal profession. He says 'the woods are full of them', and that the probabilities of your earning in the near future, as a lawyer, a living for more than yourself alone is too remote to justify our union now.

"I love you and I know that you love me. As teacher of English, my salary, while it lasted, would be sufficient to give us both a fair living. If only my own desires were to be considered my answer to you would be 'yes.' But suppose we marry now and either of us becomes ill or I become a mother. What about our children? Have you thought about them? Tell me what you think my answer ought to be?"

"Ruth," he replied, "I am ashamed to think that the welfare of our probable children never entered my mind until your words just put it there. I think your answer to me ought to be 'no, unless my father consents'."

"All right, Ralph, we agree. What, if anything, do you suggest either or both of us might do to bring father around?"

"I can't think of anything for the moment. Can you?"

"Your golf, chess and card experiences with father is a handicap. If you hope to make him change his mind, you will have to go some. Is there, possibly, anything in your law school experience that might be helpful?"

"Not a thing. But wait! Tomorrow the class is to consider a test hypothetical case sent in by an insurance company which wishes to hire a person who has real ability in the use of English. There is a chance that I might be the winner. I will write you tomorrow giving the test question and my reaction to it."

"All right, Ralph. Your tomorrow's letter will be eagerly awaited. Father is keen on cross-word puzzles, and when he starts on one he keeps at it until he has finished it. He says he never yet saw one that was strictly on the level; he says they all contain some forced factor. I think I can get him interested in the thoughts which will be contained in your letter and, if I do, it may result in his change of mind about you, so don't make any mistakes. If you do, he will be sure to find them. Paddle me back to Auburndale. We will get something to eat and you must start for New Haven in time to get a good night's rest."

Dear Ruth:

This is the letter that I promised you yesterday. The test question was as follows:

"Your teacher on the subject of statutory interpretation has given to the insurance company which presents to you the following hy-

pothetical case his opinion that each of you has had, under his teaching, information, as respects Connecticut law, sufficient for a correct reaction to the factors involved.

"This insurance company is constantly engaged in the drafting of policy wordings and also the drafting of wordings of endorsements to be attached to those policies for the purpose of extending or modifying the insurance specified therein. It also is frequently expected to be represented as a member of a committee whose duty involves the drafting of endorsements and the drafting of bills to be presented to legislatures for their consideration.

"It is the desire of this company to eliminate the possibility of the existence of litigation resulting from the fact that a wording used was subject to two justifiable interpretations, whereas a wording could have been used which would have allowed of but one interpretation.

"The use of the English by which you give expression to your reactions to the factors contained in the hypothetical case will be given a value, and the student selected will start at a salary of $3,500, to be increased as soon as the company is satisfied that the ability of the winner is as great as the company anticipated that it would be. Brevity is desired.

"Your reaction to the factors contained in the hypothetical case will depend to so great an extent on the wording of Section 5231 of the Connecticut workmen's compensation law that so much of that section as will be material to you is, for ready reference, quoted here:

> Sec. 5231. When any injury for which compensation is payable under the provisions of this chapter shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may claim compensation under the provisions of this chapter, but the payment or award of compensation shall not affect the claim or right of action of such injured employee against such other person, but such injured employee may proceed at law against such person to recover damages for such injury; and any employer having paid, or by award having become obligated to pay, compensation under the provisions of this chapter, may bring an action against such other person to recover any amount that he has paid or by award has become obligated to pay as compensation to such injured employee. If either such employee or such employer shall bring such action against such third person, he shall forthwith notify the other, in writing, by personal presentation or by registered mail, of such fact and of the name of the court to which the writ is returnable, and such other may join as a party plaintiff in such action within thirty days after such notification, and, if such other shall fail to join as a party plaintiff, his right of action against such third person shall abate. In the event that such employer and employee shall join as parties plaintiff in such action and any damages shall be recovered, such damages shall be so apportioned that the claim of the employer shall take precedence over that of the injured employee, and, if the damages shall not be sufficient, or shall be only sufficient to reimburse him for the compensation which he has paid, or by award has become obligated to pay, with a reasonable allowance for an attorney's fee to be fixed by the court and his costs, such damages shall be assessed in his favor; but, if the damages shall be more than sufficient to reimburse him, damages shall be assessed in his favor sufficient to reimburse him for the money he has paid, with a reasonable allowance for an attorney's fee to be fixed by the court and his costs, and the excess shall be assessed in favor of the injured employee."

"The hypothetical case follows:

"John Jones of Hartford, Connecticut carries on the business of making highway repairs and is under the application of the Connecticut workmen's compensation law, without being obliged to possess a workmen's compensation insurance policy.

"Bill Smith, hired in Hartford, is injured while working for Jones on a Massachusetts highway. His injury is caused by the sole negligence of Arthur Brown of Boston in accidentally running a motor vehicle against him. Brown has only a Massachusetts compulsory motor vehicle policy, which applies to damages imposed by law for bodily injury. Brown reports the accident to his insurer.

Smith is immediately given a workmen's compensation award. The award is for payments during such time as Smith is unable to return to work. After Jones had paid Smith compensation benefits amounting to $400 Smith returned to work. Jones then sued

Brown to obtain an amount equal to the amount of the compensation which Jones had paid to Smith. Smith joins in the suit. Jones is given a $400 judgment, which is satisfied by Brown.

"Afterwards, and within a year of the occurrence of the accident, Smith obtains service on Brown in a suit to obtain damages for his bodily injury. Jones joins in that suit and the judgment is for $400, which Brown's insurer correctly pays to Jones.

"More than a year after the accident Smith, while at work, drops dead and it is proven that his death resulted from the injuries which he had sustained in the accident.

"Jones is obliged to pay compensation benefits to Smith's dependent widow and children.

"The administrator of Smith's estate sues for death damages and obtains a $10,000 judgment against Brown.

"Your conclusions are to be based on a strictly grammatical interpretation of the law as worded without giving any value to any legislative intent which is not grammatically expressed."

"My requested reaction was given as follows:

"The first suit mentioned in the case was by Jones to obtain a judgment for an amount equal to the amount of the compensation payments made by Jones to Smith and resulted exactly in accord with the right of Jones as expressed in the second clause of the first sentence of Section 5231. That suit was clearly for a right existing to Jones for damages for an injury sustained by Jones in being obliged by law to make payments to Smith. Brown's motor vehicle policy applied to damages for bodily injury. The suit by Jones was for a payment injury. It was not a suit for damages for a bodily injury, notwithstanding that a payment injury resulted from a bodily injury.

"The payment to Jones of the judgment amount resulting from the suit of Smith against Brown for damages for Smith's bodily injury was in accord with the law as expressed in the third quoted sentence of said Section 5231, and resulted from a correct grammatical interpretation of the wording used in that section.

"Jones pays dependency compensation. The injury to Jones which consisted of required dependency compensation payments was an injury which occurred to Jones in Connecticut and resulted from an accident which occurred in Massachusetts. The dependency compensation payments were not payments of "compensation to such injured employee", and as Connecticut law does not classify a dependent as an "employee" the second clause of the first sentence of said Section 5231 would not be helpful. Moreover, as the Connecticut statute of limitations in such a case runs for one year only and commences to run, not from the time the injury occurs, but from the time of the occurrence of the negligence which causes the injury, such statute would, if pleaded, bar any right of Jones to recover."

Dear Ralph:

Father took only a few minutes for his analysis of your thoughts about the hypothetical case. He says that you should have mentioned the fact that Section 5231 gives no subrogated right to the employer and that you should also have pointed out that as the employee could never have any right in the amount recovered by his employer to reimburse the employer for the amount of the compensation payments made by him to the employee, it was immaterial whether or not the employee joined with the employer in the latter's suit to recover an amount equal to the compensation payment amount.

He thinks any of your classmates could have given a response as good as yours and perhaps better. But don't give up yet. Something tells me that all is not lost.

In talking with Father I learned for the first time that he is defendant in a law suit soon to be tried in Boston. He fears that he is licked but says that if anyone can show him the way out, that person will have his everlasting gratitude and will have given proof of the possession of gray matter of a quality far above the average. He says that his own attorneys don't give him a look-in.

With the thought that you might possibly be the one who could show him the way out I obtained the full story and all the papers that go with it. They are enclosed. Personally I feel no hope.

Tearfully yours,
Ruth.

Dear Ruth:

Since receiving the information about the suit against your father I have been living in the college library, and on sandwiches only. Any result? Read and laugh if you can, and I think you can.

There is no dispute about the facts involved in that suit. They are as follows:

Your father was operating his automobile in Connecticut and ran it negligently and accidentally against an employee of a Massachusetts employer. The injured employee was working on a Connecticut highway repair job which was the kind of work described in the Standard Workmen's Compensation and Employer's Liability Policy issued by the plaintiff insuring company to the employer. The injured had been hired in Boston and had not rejected the application of the Massachusetts workmen's compensation law to his injury. The Massachusetts Supreme Judicial Court has held that such a policy as is above described requires the insurer to pay compensation benefits to such an injured employee, notwithstanding there is nothing mentioned in the policy about any Connecticut work. The case in which the court so held is Pederzolis Case, 269 Mass. 550, 169 N.E. 427.

At the time that the accident occurred your father had a motor vehicle policy contracted for and issued to him in Massachusetts and he reported the accident to his insurer. The injured made a compensation claim and was paid compensation benefits under the requirements of the Massachusetts workmen's compensation law. Those payments of compensation were made directly to the injured employee by the plaintiff insuring company. The plaintiff insuring company was thereby subrogated to whatever damage rights existed to the employee. It brought suit to obtain the damage right judgment for the injury sustained by the employee. The suit resulted in a $500 judgment which was satisfied by your father's motor vehicle insurer.

The workmen's compensation award required the plaintiff insuring company to make compensation payments of $4,000, and the suit now about to be tried against your father is to obtain from him the difference between the amount of $500, the damage judgment amount, and $4,000, the compensation amount.

Your father's motor vehicle insurer has written him that its policy does not apply to damages for the injury for which the suit is brought. It takes the position that the policy applies only to an injury which results from an obligation imposed by law upon the plaintiff, and that as the plaintiff was under no obligation to issue the policy its obligation was not imposed by law, but by contract only. It also takes the position that the policy applies only to an obligation imposed by law for damages for bodily injury and does not apply to damages for an injury arising out of a bodily injury, even though the injury would not have occurred except for a bodily injury.

As your father's attorneys seem to agree with the thoughts expressed by your father's motor vehicle insurer, it seems to me that I ought to give my thoughts in full as respects the factors involved.

If a contract of hire is entered into, no valid agreement could be made between the master and servant that the master was not to be held liable in damages in the event that the servant sustains a bodily injury through the failure of the master to furnish a reasonably safe place within which to work, or through the failure of the master to give the servant needed warnings of the dangers which might result from his exposures.

The master would not have been under obligation to enter into the relationship of master and servant, but if he does enter into that relationship his obligation to furnish a reasonably safe place, reasonably safe tools and needed warnings will be an obligation imposed by law. It is true that an insuring company is not obliged to issue a workmen's compensation policy, but if it does issue such a policy, it is required by law to include in such policy an obligation to pay compensation benefits directly to the injured employee, and such obligation thus becomes an obligation imposed by law.

There are those who argue that as a third party defendant never was under an obligation to pay compensation benefits to the injured it cannot be held liable in damages to the employer who has become obligated to pay those compensation benefits.

Your father's suit involves Massachusetts law.

What does Massachusetts hold as to whether an injury has been sustained by a person who, under an obligation imposed by law, has made a money payment due to the sole negligence of another? The syllabus in the case of John C. Gray vs. Boston Gas Light Company, 114 Mass. 149, reads: "The owner of a building to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe, and ultimately to cause its fall upon a passerby, may be liable for the damage so caused; and if, when so liable, he pays the damage, he has an action against the company for indemnity."

The following is quoted from the opinion:

"The ground of action is that the defendant has, by his own unauthorized act, exposed the plaintiff to a liability, and it is immaterial whether the liability is imposed by force of a statute or by the rules of the common law."

Apply the law as expressed in those quoted words to the facts contained in the suit against your father. The plaintiff insuring company was exposed to a workmen's compensation payment liability by force of a statute and was so exposed because of an unauthorized act of the defendant, your father. When the plaintiff paid the compensation it had then been injured. That injury is the subject of the suit and the fact that there can be no recovery over does not alter the fact that the plaintiff has sustained an injury. Two injuries were caused by the defendant's negligence; one of them was a bodily injury and the other was a payment injury.

Section 15 of the Massachusetts workmen's compensation law has reference to damages for the bodily injury sustained by the employee, but makes no reference to the right of the insurer to obtain reimbursement for its loss, and it could not be consistently argued that an insurer which has taken advantage of its subrogated right, has thereby lost its right to damages for its own injury.

It appears to me evident that your father can be held liable in damages for the compensation payment loss sustained by the plaintiff. It is my thought that your father ought to pay that loss and then sue his motor vehicle insurance company.

The following are my thoughts as to whether your father's motor vehicle policy would apply to the injury alleged by the plaintiff:

The policy has two insuring clauses, one of which applies to bodily injuries caused by accident and arising out of the use of the motor vehicle on a Massachusetts highway, and the other insuring clause reads:

"TO PAY on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons in such of the divisions hereinafter defined as are indicated by specific premium charge or charges in item 4 of the declarations, caused by accident and arising out of the ownership, maintenance or use of the motor vehicle."

The latter insuring clause clearly applies to 'damages because of bodily injury sustained by any person caused by accident and arising out of the use of the motor vehicle.'

The injury for which your father is sued in damages is an injury because of bodily injury sustained by an employee to whom the plaintiff was required by law to make compensation payments. In case of controversy as to the meaning of the policy wording, the court must find in favor of the insured if such finding is justified.

I await with breathless anticipation your father's reaction.

Yours in hopes,

Ralph.

A telegram worded as follows was on the following day delivered in New Haven to Ralph:

Couldn't get you on telephone and can't wait to write. Father has read your analysis of his case and says we are to marry immediately, with a real wedding here in Wellesley and a month's honeymoon, both at his expense. Ruth.

Liability for Damages for Nuisances Resulting From Atmospheric Pollution

By CLARENCE B. RUNKLE
Los Angeles, California

THE problem of liability for damages for nuisances resulting from atmospheric pollution has again been given emphasis by the construction and operation of experimental chemical plants of various kinds to serve war demands. The scarcity of critical materials has necessitated the conversion of existing facilities in thickly populated areas. Ensuing operations have frequently produced unanticipated results, sometimes to the great distress of the neighbors.

There are various remedies for nuisances, both criminal and civil. With the former we, of course, are not here concerned. As to the latter, the field extends beyond our present scope. The injunctive and abatement remedies, whether prosecuted publicly or privately, are not subject to insurance coverage. It is only the action for damages that activates the companies' claims and legal departments.

An action for damages will lie without seeking abatement. *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 92 Pac. 70; *Katenkamp v. Union Realty Co.*, 6 Cal. (2d) 765, 59 Pac. (2d) 473. Sometimes, injunction or abatement proceedings cannot be successfully maintained. *In re Flaherty*, 105 Cal. 558, 38 Pac. 981, contains this dictum: "When the public welfare requires it, a nuisance may, for special purposes, be permitted." Under the urgency of war necessity, local authorities, under constraint of Federal agencies, usually withhold abatement proceedings and harassed citizens are left to their private remedies. Of these, they naturally choose the action for damages. That such action will lie, regardless of public necessity or authority, we shall see later.

In many jurisdictions common law rules of nuisances have been affected substantially, and in some instances changed entirely, by statute. Any consideration of this subject, therefore, must start in each instance with an investigation of the statutes of the jurisdiction in which the problem arises. This article is being written in California, and in this State these rules have been expressed since 1872 in the following Sections taken from the Civil Code:

Section 3479: "Any thing which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or any public lake, square, street or highway is a nuisance.

Section 3480: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Section 3481: "Every nuisance not included in the definition of the last section is private."

Section 3482: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

Section 3484: "The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence."

Section 3493: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise."

Remedies are largely controlled by Section 731 of the Code of Civil Procedure, which reads as follows:

Section 731: "(Nuisance: Action for Abatement and damages authorized; By whom action may be instituted). An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and

each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city, in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."

Application of these rules to the unlimited variety of circumstances which have become the subject matter of litigation, has resulted in much apparent, if not actual, confusion of pronouncements in the appellate decisions. A lawyer, being necessarily partisan, starts with a theory and searches for favorable judicial statements to support it. It is not difficult to find such statements respecting nuisances regardless of the theory espoused. The researcher, therefore, must never rest content until he is reasonably sure that he has exhausted the field.

Nuisances have been classified in various ways. It is important here to examine the distinction frequently made between public and private nuisances because there is no cause of action for damages for a public nuisance. *Brown v. Rea,* 150 Cal. 171, 88 Pac. 713; *Siskiyou Lumber Co. v. Rostel,* 121 Cal. 511, 53 Pac. 1118. In California the pertinent definitions are found in section 3480 and 3481 of the Civil Code above quoted.

The cases add an additional element. In order to make a nuisance private in character, "the injury to the individual must, however, be *different in kind and not merely in degree from that suffered by the general public*". *Brown v. Rea,* 150 Cal. 171, 174, 88 Pac. 713. (Emphasis mine).

This same distinction was laid down in numerous other cases, such as *Eaton v. Klimm,* 217 Cal. 362, 368, 18 Pac. (2d) 678; *Jardine v. City of Pasadena,* 199 Cal. 64, 75, 248 Pac. 225, 48 A.L.R. 509; *Frost v. City of Los Angeles,* 181 Cal. 22, 24, 183 Pac. 342; *Hogan v. Central Pacific Railroad,* 71 Cal. 83, 11 Pac. 876; and *Donahue v. Stockton Gas and Electric Company,* 6 Cal. App. 276, 92 Pac. 186.

Lind vs. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437, was a suit to abate a sewage nuisance of a two-fold character. It was complained that excremental matter was conveyed to and deposited upon plaintiff's land along the banks of a creek, and it was also complained that the sewage system resulted in foul odors and stenches which polluted the atmosphere. The lower court's ruling granting a nonsuit on the ground that the nuisance was public only, was reversed principally because of the sewage deposits on plaintiff's land which were held to constitute a private nuisance. Justice Henshaw wrote a concurring opinion distinguishing the land defilement from the atmospheric pollution by using the following significant language:

"It appears by the complaint, supported by the evidence, that plaintiff suffered peculiar and special damage by reason of the deposit upon his land of quantities of offensive sewage matter. That the stench was more offensive where he resided than it was elsewhere, or that his family was exposed to greater danger of disease by reason of the nuisance, does not, in my opinion, constitute a special injury, but merely a greater injury of a general kind. But for the reason first above quoted, which is noted in the learned commissioner's opinion, I concur in the conclusion he reaches and in the judgment of the reversal."

This statement, together with the decision in *Donahue vs. Stockton Gas and Electric Company,* supra, and to a lesser extent the language found in some of the other opinions above cited, indicating, as they do, that atmospheric pollution is a public nuisance only and not grounds for private recovery of damages, would make a defense lawyer, charged with the task of absolving a war-time chemical plant from liability, feel quite jubilant. He would be in for quite a jolt, however, if he leaned back on his oars merely on the basis of these fruits of his endeavors.

To the two classifications of public and private nuisance has been added a third sometimes called mixed nuisances, which means merely that a nuisance may be both public and private at the same time. This third classification is particularly applicable to atmospheric pollution cases. The rule now firmly fixed, by reason of its oft-repeated declaration, is that fumes or odors, which constitute a public nuisance insofar as they blanket a whole community, also become private nuisances when they invade private premises and disturb the quiet, wholesome or safe enjoyment thereof. Thus, in *Fisher vs. Zumwalt,* 128 Cal. 493, 61 Pac. 82, a suit for abatement of a private nuisance and for damages resulting from foul odors from sour milk and refuse

resulting from the operation of defendant's creamery, the California Supreme Court says:

> "The fact that a nuisance is public does not deprive the individual of his action in cases where, as to him, it is private and obstructs the free use and enjoyment of his private property."

Later in the opinion the Court further says:

> "At the same time, to those living upon the street and within the immediate sphere of the noxious influences, it is both a public and a private nuisance. Those individuals, therefore, to whom the injury is real and substantial, as, for example, if it consists in impaired health of the individual or members of his family, are entitled to a private remedy for the damages sustained and for the protection of their special interests."

Again:

> "But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong so as to take away from the persons injured the right, which they would otherwise have, to maintain actions to recover damages which each may have sustained in his person or estate, from the wrongful act."

Declarations of like import will be found in these additional cases:

Sullivan vs. Royer, 72 Cal. 248, 13 Pac. 655 (smoke);

Williams vs. Bluebird Laundry, 85 Cal. App. 388, 259 Pac. 484 (Odors, smoke, etc.);

Lind vs. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437 (Fumes);

Hulbert vs. California-Portland Cement Co. 161 Cal. 239, 118 Pac. 928 (Dust);

Johnson vs. V. D. Reduction Co., 175 Cal. 63, 164 Pac. 1119 (Garbage odors from hog ranch);

Willson vs. Edwards, 82 Cal. App. 564, 256 Pac. 239 (Odors and noises from lunch counter);

Judson vs. Los Angeles Suburban Gas Company, 157 Cal. 168, 106 Pac. 581 (Smoke and odors from gas works);

McIntosh vs. Brimmer, 68 Cal. App. 770, 230 Pac. 203 (Dust from chicken ranch).

In *Judson vs. Los Angeles Suburban Gas Company,* supra, the California Supreme Court lays down the following propositions which remain the law down to this time, and represent the almost universally adopted rules throughout the country today:

1. Although the manufacture of gas is necessary to the comfort of the people of the community, the gas company must not operate its plant so as to cause damage to others, even when operating under municipal *permission* (such as being located in an area properly zoned for that purpose, or under municipal license) or under public *obligation* to furnish a commodity.

2. The fact that other sources of possible discomfort to the plaintiff existed in the neighborhood of his property constitutes no defense to an action of this nature.

3. Not even the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance.

4. The exact extent of damage to realty need not be proved. The court can itself determine and fix the amount of damage to be allowed for the discomfort and annoyance resulting from the nuisance.

5. It need not be shown that the discomfort experienced by the plaintiff was continuous or constant.

6. The plaintiff need not show that his health was actually impaired. It is sufficient to show that the odors, smoke and noise was offensive to the senses of the normal individual.

To the same effect, see:

People vs. Selby Smelting, 163 Cal. 84, 124 Pac. 692;

Dauberman vs. Grant, 198 Cal. 698, 246 Pac. 319;

Fendley vs. City of Anaheim, 110 Cal. App. 731, 293 Pac. 769;

Vowinckel vs. Clark, 216 Cal. 164, 13 Pac. (2d) 733.

An excellent discussion of this whole subject, pertaining to deleterious fumes and odors, is to be found in United States Law Review, Vol. 65, page 299, et seq.

It is at once apparent that these authorities change the complexion of the matter entirely. The investigation, therefore, must be pushed further. Returning to the statutory law, Civil Code Section 3482, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance", seems at first blush to afford some defense. This statute, however, has been confined by court construction to cases where "the express authority of a statute" was given for some specific

and particular act or condition, such as the maintenance of an electric light pole in a highway (*Norton vs. City of Pomona,* 5 Cal. (2d) 54, 53 Pac. (2d) 952) and the maintenance of a street drain (*Womar vs. Long Beach,* 45 Cal. App. (2d) 643, 114 Pac. (2d) 704). The mere fact that the conduct of the particular business in question was licensed, or authorized by a zoning ordinance, does not mean that conditions resulting from the conduct of the business, such as the emission of fumes or smoke, enjoy the sanction of statutory authority. *Hassell vs. San Francisco,* 11 Cal. (2d) 168, 78 Pac. (2d) 1031; *People vs. Reedley,* 66 Cal. App. 413, 226 Pac. 408; *Williams vs. Bluebird Laundry,* 85 Cal. App. 388, 259 Pac. 484; *Fendley vs. City of Anaheim,* 110 Cal. App. 731, 293 Pac. 769; *Vowinckel vs. Clark,* 216 Cal. 156, 13 Pac. (2d) 733; *Eaton vs. Klimm,* 217 Cal. 362, 18 Pac. (2d) 678.

Furthermore, as has been pointed out in the foregoing cases, and also by the United States Supreme Court in *Baltimore & Potomac R. R. Co., vs. Fifth Baptist Church,* 108 U. S. 317, and *Richards vs. Washington Terminal Co.,* 233 U. S. 546, legislative authorization exempts a party only from injunction or abatement or criminal actions at the instance of governmental bodies, and does not affect any claim of a private citizen for damages for any special inconvenience or discomfort suffered by him on his own private property.

Returning to the statutory rules, we find, as a possible answer to these cases, Section 731a of the Code of Civil Procedure, enacted by the California Legislature in 1935, and reading as follows:

> "Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canneries, fertilizing plants, refineries and other similar establishments whose operations produce offensive odors."

Since there is not yet any judicial construction of this statute, it can well be assumed that the legislature intended to relax the strict construction placed on Section 3482 of the Civil Code by the courts when they limited the statutory authority provided in that Section to specific acts or conditions. All benefit of the statute for our present problem seems, however, to have been eliminated by the concluding clauses of the statute, "without evidence of the employment of unnecessary and injurious methods of operation", and, "nothing in this act shall be deemed to apply to the regulation . . . of canneries, fertilizing plants, refineries and other similar establishments whose operations produce offensive odors." Furthermore, it is to be doubted that this Section will be construed as applicable to a damage action brought by a private citizen. It is more likely that the courts will hold that this new statute was intended to protect industrial establishments only against injunction and abatement suits and criminal actions instituted by public authority.

It remains, finally, to investigate war necessity as a possible defense. Cases in point are very scarce.

Some very comforting language is to be found in *People vs. Amecco Chemical, Inc.,* 43 N.Y.S. (2d) 330, where a judge in the Criminal Branch of the City Court of Rochester, New York, on June 24, 1943, found the defendant not guilty in a criminal action for maintaining a public nuisance by operating a plant which discharged noxious fumes and odors. The court found that the defendant's business was highly essential for the protection of the Armed Forces in the field. After holding that the members of the community are entitled to good air to breathe, the court observed that those who choose to live in a city cannot always expect to enjoy the pure air of suburban areas and that city atmosphere is seldom free from factory smoke and odors and that the resulting inconveniences must be weighed against the common good, and then proceeded to say:

> "To the extent that the common good assumes national proportions, it becomes by just so much a stronger factor; and when that factor involves the power of the federal government to equip armies, no undue interference with it will be tolerated. *People ex rel, Astoria Light H. & P. Co.*

vs. Cantor, 236 N.Y. 417, 141 N.E. 901, 30 A.L.R. 1458. War powers "are not limited by these ordinary rules. They are not bounded by any specific grant of authority . . . They are such powers as are essential to preserve the very life of the nation itself. When requisite to this end the liberty of the citizen . . . the peace-time rights of the states must all yield to necessity." *Public Service Commission vs. New York Central R. R. Co.,* 230 N.Y. 149, 129 N.E. 455, 14 A.L.R. 449.

"In relation to a 'State statute based upon a peace-time economy — — at a time when our Nation is at war and in relation to a subject which vitally affects the national defense . . . realism requires such construction as permits the most efficient co-operation with the Federal agencies directly charged with the duty of carrying on the war. . . . In time of war, the construction of peace-time statutes, contractual relations and individual liberties must be subjected to such changes and modifications as are the natural offspring of national emergency and necessity.' *International Association of Machinists vs. E. C. Stearns & Co.,* 178 Misc. 661, 36 N.Y.S. (2d) 156, 159."

This case, however, is of doubtful value because, for one thing, it is a criminal proceeding, and, as we have seen, private actions for damages will lie when criminal actions will not. For another thing, the facts found by the court were extremely favorable to the defendant in that the function of defendant's plant was absolutely essential to the war effort, the defendant's equipment was the best obtainable and was adequate for the purposes and, while some of the neighboring residents had been affected considerably by the fumes, there was no case where illness had resulted or a physician had been called. The question, therefore, was more of convenience than vital necessity to the public, and the resulting situation afforded the court a most ideal opportunity to balance public war-time needs against private rights.. Furthermore, the decision comes from an inferior court.

An opposite result was reached in the private injunction suit of *Godard vs. Babson-Dow Mfg. Co.,* 47 N.E. (2d) 303, decided on February 24, 1943, by the Supreme Judicial Court of Massachusetts, in which the court in part said:

"The defendant contends that no injunction should be granted for the reason that it is engaged in war work. The importance of this work cannot be minimized or disregarded. It is well settled that, within constitutional limitations, legislation may make things nuisances that were not, or make things lawful that were nuisances, although by so doing the use or value of property is affected. *Sawyer vs. Davis,* 136 Mass. 239, 241, 49 Am. Rep. 27; *Commonwealth vs. Parks,* 155 Mass. 532, 30 N.E. 174; *Marshall vs. Holbrook,* 276 Mass. 341, 346, 177 N.E. 504. Moreover, in times of war, a government contractor may be able to point to a special privilege which has been created by law or by executive or governmental regulation having the force and effect of law, so that he may be excused from the performance of obligations which otherwise he would be required to observe. And this also may be true in the case of persons who are not contractors, but who come within the sweep of governmental regulations. See *State Realty Co. v. Greenfield,* 110 Misc. 270, 181 N.Y.S. 511; *Roxford Knitting Co. vs. Moore & Tierney, Inc.,* 2 Cir., 265 F. 177, 11 A.L.R. 1415; *Highland vs. Russell Car and Snowplow Co.,* 279 U.S. 253, 49 S. Ct. 314; 73 L.Ed. 688. We are of the opinion that the rights of the parties are not governed by the principles just referred to.

"The defendant contends, however, that, by virtue of a Federal statute, the facts found by the master constitute a complete defense to these suits. It refers to Section 9 of 54 U.S. Stat. Part 1, p. 885, 892, 50 U.S.C.A. Appendix Section 309. This section, in effect, empowers the President to place an order with any individual or firm for the production of any article required by the government that such individual or firm usually produces or is capable of producing. Compliance with all such orders is obligatory and takes precedence over all other orders and contracts theretofore placed with such individual or firm. There are further provisions for the conscription of industry and for punishment by fine and imprisonment of anyone who fails to comply. There is nothing, however, in this section that authorizes, either expressly or by necessary implication, the maintenance of a nuisance by a person or firm operating under its provisions. It is assumed that the defendant's shop is devoted exclusively to production that comes within the purview

of said section 9, but this fact does not deprive neighboring property owners of their remedy for annoyances and injuries, especially where, as here, the maintenance of nuisance is not necessarily incident to the defendant's operation, and where the acts amounting to a nuisance may be rendered unnecessary by the installation of practical devices which, the master has found, are readily procurable by the defendant in the market."

In the case of *Lester vs. G. L. Tarlton Contractor, Inc.*, 45 Fed. Supp, 994, a judge of the Federal District Court of Missouri held, in determining whether or not a federal question was presented, in a suit by property owners for damages resulting from government contractors entering upon their land and constructing facilities for military training purposes, that although the defendants were engaged by the government to construct facilities for military purposes, yet, in entering upon the land and in engaging in the work contracted to be done by them, they were necessarily working for and on behalf of the government, and since the government was in the midst of a great national emergency, neither state law nor any individual could interfere with or thwart that purpose, and that therefore a federal question was presented. It is to be noted, of course, that this case did not deal with the question of whether damages were allowable.

In the case of *Driver vs. Smith,* 104 Atl. 717, it was said:

> "Unless a contractor with the government can point to a special privilege which has been created by *law,* or by executive or governmental regulations having the *force* of law, he stands before the court in precisely the same situation as any other person."

In the case of *Marconi vs. Simon,* 227 Fed. 908, it was held that in times of national stress and trouble, an injunction against a nuisance may be denied, but the damaged parties will still be given their right to obtain monetary compensation.

The trend of these decisions indicates that regardless of war necessity, manufacturing operations which result in a private nuisance give rise to a private cause of action for damages to those who can establish a private or mixed nuisance.

Article I, Section 14, of the California State Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . ." Under ordinary peacetime conditions public convenience and necessity have universally been held to constitute no defense to an action for damages for a private nuisance because the invasion of private property rights amounts to the taking of private property and this should be done only by appropriate eminent domain proceedings in which the damaged owner is justly compensated. If it becomes necessary to install a gas plant to serve a community it must either be so located as not injuriously to affect neighboring residents, or, through eminent domain proceedings, such residents must be given just compensation for the damage they suffer.

In time of war the public need of the use of private property involves an element of haste not incident to ordinary peace-time needs. This haste makes established eminent domain procedures impracticable. In lieu thereof, the Government resorts to confiscation. Confiscation, however, differs from eminent domain only in this factor of haste. In *DuPont Co. vs. Davis,* 264 U.S. 456, which involved the Government's seizure of the railroads as a war measure, the Court stated on page 462, that such seizure was approved "under a right in the nature of eminent domain."

As set forth in 67 Corpus Juris, 376, confiscation, which is a war-time expedient and a short cut for eminent domain, envisages, as does eminent domain, compensation for damages resulting from seizure.

It appears, therefore, that war necessity does not constitute a defense to a private action for damages resulting from a private or a mixed nuisance.

The very convenient solution to the besetting problems of the harrassed Government agencies and civilian contractors to whom they turn for essential war materials, consists in proceeding pell-mell to satisfy the public needs which it is their duty to serve, without regard for any resulting invasions of private rights, casting those wrongs and their resulting liabilities upon the shoulders of the insurance companies who are willing to provide coverage on the offending operations. Reliance should be placed on the underwriting departments rather than on the claims and legal departments for protection against excessive losses.

Liquidated Damages in Government Contracts—A Rewiev

By Nelson R. Kerr, *Attorney*
New Amsterdam Casualty Company,
Baltimore, Maryland

THE Congress of the United States by the Act of June 26, 1902, Chapter 1036, §21 (32 Stat. 310, 326; 40 U.S.C. 269) provided that all contracts for the construction of any public building under the control of the Treasury Department must contain a stipulation for liquidated damages for delay which stipulation shall be binding upon all parties and render proof of actual damages unnecessary. The wording of this section was changed by Reorganization Plan No. 1, §301, 303, effective July 1, 1939 (53 Stat. 1426, 1427; 40 U.S.C. §269) as the Federal Works Agency took over the former function of the Secretary of the Treasury respecting selection of location, etc., of public buildings. The changes, however, were not fundamental and the section remained the same except that where "Treasury Department" originally appeared "Federal Works Agency" was substituted, and where "Secretary of the Treasury" appeared "Federal Works Administrator" was substituted.

Following passage of the legislation, government contracts contained a provision for liquidated damages. The provision appeared as part of the Specifications and as Article 9 of the contract and was worded as follows:

"Delays-Damages—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof. * * *"

It is to be observed that the Act referred to above provided that all contracts specified must contain a stipulation for liquidated damages and that the wording of the form of Government contract under Article 9 was to the effect that if the Government did not terminate liquidated damages (at an agreed amount) would be payable inasmuch as actual damages would be impossible of determination. It became apparent that the viewpoint of the Government was broader than the language expressed in the Government contract for it contended that it had the right to deduct from the final contract price liquidated damages based on the provisions of the specifications and of Article 9 even where it had terminated the contractor's right to proceed.

In the case of Fidelity and Casualty Company of New York vs. U. S., 81 Ct. Cls. 495, decided May 6, 1935, it appeared that on September 12, 1931, one R. O. Stake entered into a contract with the United States whereby the contractor was to construct for the Veterans Administration at Lincoln, Nebraska, certain additions to hospital buildings. The contract contained Article 9 and provided for daily liquidated damages at $50.00.

On September 28, 1931, the contractor received notice to proceed, the completion date being specified, in accordance with the contract, as February 10, 1932. On February 10, 1932, the work was not completed, the contracting officer notified the contractor by telegram that his right to complete was term-

inated and on March 11, 1932, the Fidelity & Casualty Company offered as surety on the bond to complete "within the terms and provisions of the original contract". The Government accepted the offer and agreed to the contractor named by the surety to complete the work.

When final settlement was made the Comptroller General deducted $50.00 per day for each day from the day the right to proceed was terminated until the date of acceptance. In deciding against the Government's contention the Court of Claims said:

> "Under Article 9 above quoted both parties agreed that upon failure of the contractor to perform the work within the time fixed in the contract the Government had at its election two courses which it could pursue. The first was to terminate the contract and hold the contractor and his surety for the excess costs of completion and actual damages suffered. The second course was to allow the contractor to continue to perform the contract and to charge him liquidated damages for failure to deliver on time. The amount of this damage both parties had agreed in the contract would be a certain amount for each day completion was delayed from the time fixed for completion. The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere surplusage. Upon the termination of the contract no liquidated damages could be charged to or recoverable from the contractor."

The Court of Claims had occasion in 1936 to consider again the question of liquidated damages. The case was that of Commercial Casualty Company vs. U. S., 83 Ct. Cls. 367, decided on May 4, 1936. In this case the basic facts differed a little from the Fidelity and Casualty Company case. The contractor abandoned the work forty-eight days prior to the completion time specified in the contract, notified the Government of that fact, the Government terminated the right to proceed and attemped to enter into a new contract with the Commercial Casualty Company. The Commercial Casualty Company refused to execute the new contract but offered to complete its Principal's contract and did so. In this case the Court of Claims again held that when the Government exercised its right to terminate the contract the provision for liquidated damages ceased to exist.

In the Fidelity and Casualty Company case the Government terminated the right to proceed on the date that the contract time expired and the surety entered into a new contract; in the Commercial Casualty Company case the work was abandoned prior to its completion time and although the surety completed the contract no new contract was entered into. Following these cases, the Government apparently agreed that where no work was done by the contractor following the completion date specified the Government could not collect liquidated damages where the right to proceed had been terminated.

There followed in the Court of Claims the cases of American Employers Insurance Co. of Boston, Massachusetts vs. U. S. (91 Ct. Cls. 231, decided May 6, 1940) and Fireman's Fund Indemnity Company vs. U. S. (93 Ct. Cls. 138, decided March 3, 1941). In the latter case the Government's attorneys conceded at the time of trial that the amount of liquidated damages deducted from the final contract price could not be retained. In the American Employers Insurance Company case, although liquidated damages had been assessed, nevertheless at the time of final settlement a portion of the liquidated damages were not deducted.

The American Employers Insurance Company case is interesting as it seems to have raised for the first time the question of the right of the Government to deduct liquidated damages in divisible contracts. In this case the contractor had entered into an agreement with the United States for the erection of buildings and other work for the Veterans Hospital at Des Moines, Iowa. Certain of the work was to have been completed prior to the completion date of the entire contract. The contractor proceeded with the work and the portion that was to have been completed prior to the main contract was twenty-eight days late. Later on the contract was terminated by the Government and the surety agreed to complete within the terms and provisions of the original contract. At the time the contractor stopped work the Government owed him certain monies against which it claimed liquidated damages of $4200.00 because of the failure on the part of the contractor to complete part of the work on time. The surety completed the work, the Government assessed liquidated damages of $8700.00 due to failure to com-

plete on time, but in the final settlement retained only $4200.00. The surety contended that the contract was an entire contract and that since the Government has terminated it under Article 9 the liquidated damage clause disappeared. The Court, however, held that the contract was divisible, that the surety was aware of the liquidated damages for delay at the time that it undertook to complete, and that the liquidated damage clause disappeared after the contract was cancelled by the Government and not before.

In the meantime, the United States District Court for the District of Maine, Southern Division, had decided the case of the United States for the use and benefit of General Literage Co vs. Maryland Casualty Company (25 Fed. Supp. 778, decided Dec. 28, 1938). In this case the contract was for the removal of a sunken barge and the work was to have been completed on June 16, 1933. The contractor encountered difficulty and on October 11, 1933, the United States Engineer's Office told the contractor that the work must be finished by October 25, 1933 "or such plant placed on the work as will in the opinion of this office insure its complete removal within a reasonable time thereafter." On January 31, 1934, the Government terminated the contractor's right to proceed and relet the work. Thereafter the Government sought to recover the costs incident to completion, as well as liquidated damages from June 17, 1933 to January 31, 1934. The Federal District Court held that the Government was not entitled to collect liquidated damages and pointed out that the Government's rights were alternative: it could take over the work, complete it and collect extra costs on it could await completion by the contractor and collect the liquidated damages provided for. It could not do both. In this case the Court allowed recovery for the actual damages sustained, the amount of which was agreed to by the surety.

The Government apparently was not satisfied with the decision of the United States District Court for we find that on March 3, 1941, the Court of Claims decided a case similar in nature. This is the case of Maryland Casualty Company vs. U. S., reported 93 Ct. Cls. 247. In this case the contractor had agreed to complete the work by a specified time but had not done so and was permitted by the Government to remain on the job for ninety-one days after the completion date. Then the Government terminated the contractor's right to proceed and advised the surety which, in turn, advised the Government that it did not desire to complete the work. In making settlement the Government withheld $3185.00, representing ninety-one days at $35.00 per day, plus $994.16 excess cost of completion, and, in addition, deducted an architect's salary for the time that the work was being completed. The Government contended it was entitled to recover the liquidated damages for the ninety-one day period as these damages had accrued prior to the notice of termination and that it was entitled to excess costs and the architect's salary thereafter.

The majority opinion was that the Government had the choice of permitting the contractor to continue or of taking over the work and collecting excess costs. It distinguished the American Employers Insurance Company case on the ground that in that case the contract was divisible and damages had accrued prior to the date of cancellation. It followed the General Literage case in which, for the first time, as indicated above, there was presented a question of the right of the Government to collect liquidated damages for the time that the contractor remained on the job after the completion date. There were two dissenting opinions filed. In one the Judge stated that there was a continuing default for ninety-one days or until the right to proceed was terminated and that while liquidated damages ceased as of the termination of the right to proceed, nevertheless the Government was entitled to withhold the per diem penalty of $35.00 for ninety-one days; in the other the Judge held that the Government's rights were not alternative and that it was entitled to retain liquidated damages for the delay.

In this case although liquidated damages were denied, the Government did collect the excess cost of completion as well as the architect's salary for the time that the architect remained on the job following termination. It is not entirely clear whether or not the architect was a Government employee but in the opinion the word "salary" is used, hence it would appear that most probably he was. Whether or not in future cases the Government will urge as part of the excess cost salaries of Government employees engaged in the work is a subject of conjecture, but if such idea is advanced it will follow that the surety companies will resist it.

The Government apparently was of the op-

inion that the dissenting opinions in the Maryland Casualty Company case represented the better view and that such view would be held by the United States Courts for shortly thereafter in a situation similar to that presented in the General Literage Company case and in the Maryland Casualty Company case the Government refused to concede the correctness of the Court of Claims' decision and deducted liquidated damages. This controversy led ultimately to the decision of the United States Court of Appeals for the District of Columbia in the case of U. S. vs. Cunningham (125 F. (2) 28, decided Dec. 15, 1941). In this case there was a contract for the construction of a bridge, the work was supposed to be completed on July 17, 1932, but it was not until September 12, 1932, that the Government terminated the contractor's right to proceed. In the final settlement the Government not only deducted the excess costs of completion, but also deducted liquidated damages. The United States Court of Appeals, in affirming that portion of the lower court's decision respecting liquidated damages, held that under Article 9 of the contract the Government's rights were alternative, and that as the Government had asserted one of its rights, namely, termination of the contract, it could not claim the other alternative of liquidated damages.

Thus we see that the Government had unsuccessfully maintained its contentions for liquidated damages not only where the contract had been terminated prior to the completion date specified, but also where the termination had not been made until after the date originally specified. The Government's attorneys were still not satisfied, however, and finally the question was carried to the Supreme Court of the United States.

On April 24, 1944, Mr. Justice Murphy delivered the opinion of the Supreme Court in the case of the United States of America vs. American Surety Company (64 Sup. Ct. Rep. 866—Advance Sheets 5/15/44) and denied the right to retain liquidated damages. In this case it appeared that on June 24, 1931, one John V. Grogan entered into a contract with the United States to construct certain public buildings at the United States Inspection Station at Babb-Piegan, Montana. The completion date set forth in the contract was March 4, 1932, but was extended to June 20, 1933. The contractor failed to complete the work and thirteen months later, namely, on July 20, 1934, the work still being uncompleted, the Government, under Article 9 of the contract terminated the contractor's right to proceed. The Government finished the work, incurring excess costs of $2044.04, and then instituted suit in the United States District Court for recovery of the excess costs and liquidated damages of $9875.00, the liquidated damages being computed on the basis of $25.00 per day for the 395 days between June 20, 1933 and July 20, 1934. The district Court rendered judgment for the amounts contended for by the Government (U. S. vs. Grogan, 44 F. Supp. 871.) On appeal the United States Circuit Court of Appeals for the Ninth Circuit affirmed the judgment as to excess costs but reversed it as to liquidated damages (136 F. (2) 437). Certiorari was granted by the Supreme Court thereafter (320 U. S. 729).

Counsel for the Government in arguing the case before the Circuit Court of Appeals—and presumably also before the Supreme Court of the United States—urged that Article 9 of the contract covered three distinct situations; (1) where at or before the date fixed for completion the Government elected to terminate the contractor's right to proceed and takes over the work itself or through some other contractor; (2) where the Government elected to allow the contractor to continue after the date specified for completion and the contractor finished the work late; and (3) where the Government elected to allow the contractor to continue after the date specified for completion but the contractor failed to finish the work even at the later date and the Government then elected to terminate his right to proceed and finished the work itself or through another contractor. It was agreed that in situation (1) the liquidated damage provision was not operative; that in situation (2) it is; and that the point of disagreement was whether the provision was operative in situation (3). The Circuit Court of Appeals, as stated above, denied the validity of the Government's contention and reversed that portion of the United States District Court's decision relating thereto.

The Supreme Court of the United States held that the condition involved in Article 9 was based on the Government's not terminating the contractor's right to proceed and that even though the termination was subsequent to the completion date the right to liquidated damages disappeared. The Supreme Court denied the Government's contention that the right to liquidated damages was based upon a

continuing condition under which liquidated damages would accrue as long as the Government did not terminate the contractor's right to proceed, held that the contract was unambiguous, and that it limited the right to liquidated damages to situations where the Government does not terminate the right to proceed. Affirming the decision of the Circuit Court of Appeals, Mr. Justice Murphy stated, in part: "That it may be wiser to expand the right to such damages to every case of delay, regardless of whether there is a termination, is of course not relevant in interpreting and applying clear words of limitation in the contract. We find nothing, moreover, in Section 21 of the 1902 Act that fills in interstices deliberately left open by the parties. No statutory language or policy forbids the Government and a contractor from stipulating for liquidated damages in limited sitautions only. Indeed the statute makes any such stipulation 'conclusive and binding upon all parties,' thereby foreclosing the Government's right to object to its own failure to insist upon liquidated damages in other situations. * * * we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted, * * *".

Thus we apparently come to the end of the road with respect to the question of liquidated damages as heretofore provided in Government contract specifications, and contract Article No. 9. It will be interesting to follow future developments relating to the question of damages. The Supreme Court opinion in the American Surety Company case speaks of the Government's failure to "insist upon liquidated damages in other situations." Will the Government redraft its contract specifications and its contract provisions (the language of the statute (53 Stat. 1426, 1427; 40 U.S.C. Section 269- is broad), or will it seek to recover actual damages to include perhaps salaries of its employees, etc.? Of one thing we may be certain, namely, the Government will attempt to find some early solution of its problem and attorneys who represent surety companies may expect to have the matter presented to them for attention.

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